BEFORE THE DELAWARE BOARD OF MEDICAL LICENSURE AND DISCIPLINE

IN RE: RICHARD T. CALLERY, M.D.	)	**Case No.: 10-100-14**
	)	**10-101-14**
	)	
LICENSE NO.: C1-0003252	)	**FINAL BOARD ORDER**

ORDER

At its meeting on July 16, 2019, the Board of Medical Licensure and Discipline considered the recommendation of the hearing officer. A hearing was held before the hearing officer on March 25, 2019 and the hearing officer recommendation was mailed out to Dr. Callery and the State, pursuant to 29 *Del. C.* § 10126(b), on March 30, 2019. Written exceptions were not received from either Dr. Callery or the State, but Dr. Callery was permitted to address the Board on July 16, 2019. This is the Board's final disciplinary order in this matter. The duly appointed hearing officer has filed the attached written report in which the hearing officer makes a number of findings of fact, which the Board is bound by pursuant to 29 *Del. C.* § 8735(v)(1)d. Some of the findings of fact are highlighted herein.

The hearing officer found as a matter of fact that Dr. Callery has been licensed by this Board since 1989. From 1989-1992 Dr. Callery worked an Assistant Medical Examiner (AME) at the Office of Chief Medical Examiner (OCME), under then Chief Medical Examiner (CME) Dr. Ali Hameli, and as a Surgical Pathologist at St. Francis Hospital. Dr. Callery then worked as a full-time Surgical Pathologist at St. Francis Hospital in 1992. Dr. Callery was eventually hired as interim CME from 1994-97. Dr. Callery became permanent CME from 1997 until his suspension and eventual termination in 2014.

The hearing officer found as a matter of fact that Dr. Callery's failure to perform private work on his own time resulted in systematic operational failures throughout the OCME such as

lack of management, oversight, security, and effective policies. The OCME was 1 of 12 divisions in the Department of Health and Social Services. The OCME housed the Forensic Sciences Lab which consisted of several units including the Controlled Substances Unit. In 2014, a police officer discovered while on the witness stand that the drug evidence had been tampered with. This incident led to an investigation by Delaware State Police and the Department of Justice of all drug evidence processed in the Controlled Substances Unit of the OCME. It was verified through the investigation that Dr. Callery was required to work at least 37.5 hours per week as CME. The investigation revealed that Dr. Callery's private work took up a fair amount of the time he should have been designating to his State duties, using what was approximated to be $100,000 worth of State resources. 78% of Dr. Callery's phone calls from September 2012 to March 2013 were related to his private practice. Meetings regarding private cases were held in OCME conference rooms, one even lasted close to 5 hours during OCME business hours. Dr. Callery performed 173 exams or autopsies in Rhode Island from 2008-2011. He billed Rhode Island $166,665 for 20 block of his time Monday-Wednesday as a contractual pathologist and never claimed sick, vacation, or compensatory time for any of his absences from the OCME.

After the police testimony incident in 2014, two other potential cases of evidence tampering were discovered. The OCME became discredited by the DSP-DOJ investigation, which caused criminal cases to be dismissed, charges reduced, and thousands of offenders seeking to get their convictions overturned. The hearing officer found as a matter of fact that Dr. Callery used his State-owned car for out-of-state travel to perform private business or for personal trips. GPS data from Dr. Callery's assigned State vehicle showed that from 2009-2011 the car was only parked at OCME for 54, 56, and 17.5 hours, respectively. Dr. Callery advised a private Philadelphian client not to include the $3,500 he paid to Dr. Callery on an IRS W-2 form.

Dr. Callery also billed private clients for his travel expenses even though he was using the State car to get to his destinations.

Finally, the hearing officer found as a matter of fact that in 2015 Dr. Callery agreed by pleading "no contest" to two misdemeanors counts of Official Misconduct that he engaged in unprofessional conduct that constituted a crime substantially related to the practice of medicine.

As a result of the findings of fact, the hearing officer made a number of recommended conclusions of law. The hearing officer recommends that the Board find as a matter of law that Dr. Callery violated 24 *Del. C.* § 1731(b)(10) in that he inadequately supervised all who were subordinate to him as noted by his numerous absences from the OCME and his unavailability even while physically on the OCME campus due to his being preoccupied with private consultative work during "State time."

The hearing officer next recommends that the Board find as a matter of law that Dr. Callery has violated 24 *Del. C.* § 1731(b)(3) in that he failed to conform to acceptable professional standards by not providing adequate supervision. The hearing officer further recommends that the Board find Dr. Callery engaged in "dishonorable and unethical" conduct, and brought discredit upon the medical profession when: (1) drug evidence was stolen from the OCME—causing most or all of the remaining drug evidence housed in the OCME to be seized by police— (2) State resources were used to conduct private work, and (3) Dr. Callery was absent from the OCME for substantial periods of time during his tenure as CME.

The hearing officer recommends that the Board find Dr. Callery violated 24 *Del. C.* § 1731(b)(11) insofar as he engaged in misconduct or a pattern of negligence by: (1) having an interest in a private enterprise that substantially interferes with the proper performance of one's official duties in violation of 29 *Del. C* § 5806(b), (2) using OCME to secure private gain in

violation of 29 *Del. C* § 5806(e), and (3) disclosing confidential information gained from his position as CME for personal gain or benefit in violation of 29 *Del. C* § 5806(g). The hearing officer further recommends that the Board find Dr. Callery engaged in misconduct by violating the Delaware Transportation of State Employees Act, 29 *Del. C.* Ch. 71 by operating an assigned State-owned vehicle before or after working hours and failed to park said vehicle at the OCME campus. 29 *Del. C.* § 7106(a), (b).

The hearing officer recommends the Board find Dr. Callery engaged in a "pattern of negligence" in violation of 24 *Del. C.* § 1731(b)(11) by failing over time in his civil duty as CME to act with the care of a reasonable prudent person under similar circumstances. Dr. Callery knew or should have known that his public duties were to take priority over his private duties. Therefore, the hearing officer recommends that Dr. Callery's continued failure to prioritize his public duties over an extended period of time demonstrated a reliable sample of tendencies to constitute a pattern of negligence.

The hearing officer recommends that the Board find Dr. Callery violated 24 *Del. C.* § 1731(b)(2) based on his conviction on two counts of misdemeanor for Official Misconduct in violation of 11 *Del. C.* § 1211(3).

Finally, the hearing officer finds the following mitigating circumstances are present: absence of prior disciplinary record; length of time that has elapsed since misconduct; no apparent vulnerability of patient; present fitness of the practitioner; potential for successful rehabilitation; and practitioner's present competence in medical skills. Bd. Reg. 17.15 *et seq.* The hearing officer also finds the following aggravating factors present: frequency of acts; dishonest or selfish motives; motivated by personal gain; different multiple offenses; refusal to

acknowledged wrongful nature of certain conduct; intentional acts; abuse of trust; pattern of misconduct; illegal conduct; and ill repute upon profession.

Thus as a result of these findings of fact and recommended conclusions of law, the hearing officer recommends the Board suspend Dr. Callery's license for 18 months, and that such suspension not lift until Dr. Callery petitions the Board at the conclusion of 18 months and demonstrate that he is fit to return to medical practice.

Dr. Callery was permitted to address the Board before it deliberated on the hearing officer's recommendation. Dr. Callery indicated that he served as the CME for the state of Delaware for twenty years. He originally accepted the position on an interim basis, along with his position at St. Francis Hospital. For the first four years, he did both jobs. He inherited an office—the OCME—in complete disarray. He managed to get the laboratory accredited and obtained funding for a number of its sub-departments. Accreditation lasted throughout his tenure with the OCME, up until the point of his suspension. Dr. Callery stated that the hearing officer heard about the scandal in Delaware, which encompassed 44 separate cases, 12 of which were marijuana that dried. An inventory of over 2,000 cases was conducted by law enforcement and nothing was found to be stolen. No one who worked for Dr. Callery was arrested or charged with theft. In the course of this investigation, Dr. Callery stated that his phone was tapped, his house was searched, et. He pled "no contest" to misuse of state resources because he printed his CV on state letterhead. He also performed autopsies in the state office for special cases not associated with the state. These cases included highly infectious diseases and this work was done with the knowledge of his supervisor and although he requested an opinion from the Public Integrity Commission, but he never received a response. Dr. Callery told the Board that his criminal plea included an agreement that he would surrender his license for two years. The

judge rejected this agreement and encouraged Dr. Callery to keep his license and perform community service. Dr. Callery's position with the state has been completely restructured and three people now do his job. Dr. Callery does not believe his license should be revoked as he has not done significant harm to the state. He believes he did a good job and he has nothing to be ashamed of.

Analysis

The Board is charged with ensuring that medical practice in the State of Delaware is conducted professionally and competently. 24 *Del. C.* § 1710. To ensure the carrying out of this duty the Board is vested with the power to promulgate rules and regulations designed to carry out its duties as provided by the General Assembly. 24 *Del. C.* § 1713(a)(12). The failure to comply with the Board's rules or its enabling statute is a failure to maintain the minimal assurance of competency and professionalism promulgated by this Board to assure the people of Delaware that a physician possessing a Delaware license will practice in a safe, competent manner. Therefore, the Board finds that it cannot allow any physician to continue to practice, without consequence, in violation of its law and regulations, as the Board cannot assure the citizenry that the practice will be safe and competent. The Board is bound by the findings of fact made by the hearing officer; however, is may affirm or modify the hearing officer's recommended conclusions of law and penalty. 29 *Del. C.* § 8735(v)(1)d. Here, the Board carefully considered the hearing officer's recommendation.

In general, misuse of state time by a state employee is solely an employment matter. Here however, Dr. Callery's pervasive abdication of the responsibilities of the Chief Medical Examiner over a prolonged period of time constitutes much more than a misuse of state time or resources. Indeed, Dr. Callery's abandonment of his post resulted in such serious detriment to

the people of the state of Delaware that Dr. Callery was criminally charged. The Medical Practice Act empowers this Board to discipline those licensees who it finds engaged in unprofessional conduct. 24 *Del. C.* § 1731(a). The Board's primary purpose, to which all other purposes are secondary, is to regulate the medical profession within the state for the health and welfare of its citizenry. 24 *Del. C.* § 1701. The Board accepts all of the hearing officer's recommended conclusions of law. A few require particularized comment, however. Dr. Callery's actions demonstrate a failure to supervise those subordinate to him and that this failure is indeed a failure to comport with the acceptable standards of this profession. Dr. Callery's pattern of negligence may not have affected live patients, but his behavior is nonetheless unacceptable practice. The Board is particularly troubled by the self-interested financial motive of Dr. Callery's actions and his overwhelming absence from his medical office.

THEREFORE, the hearing officer report and recommendation is accepted and Dr. Callery's license is hereby suspended for a period of 18 months. At the conclusion of 18 months, Dr. Callery's license will be reinstated if he can demonstrate completion of 20 total hours of continuing medical education in the areas of medical ethics and chain of custody for healthcare professionals. This continuing education shall be in addition to and not in lieu of that required for renewal of his license.

IT IS SO ORDERED this __17___ day of September, 2019.

DELAWARE BOARD OF MEDICAL LICENSURE AND DISCIPLINE

Garrett H. Colmorgen, M.D., President
Pursuant to 29 *Del. C.* § 10128(g)

Date Mailed: _____

BEFORE THE DELAWARE BOARD OF MEDICAL LICENSURE AND DISCIPLINE

In the Matter of:	)	
	)	Case Nos. 10-100-14
Richard T. Callery, M.D.	)	10-101-14
Lic. No. C1-0003252	)	

RECOMMENDATION OF CHIEF HEARING OFFICER

Nature of the Proceedings

The State of Delaware, by and through the Department of Justice, has filed a professional licensure complaint against Richard T. Callery, M.D., an active licensee of the Delaware Board of Medical Licensure and Discipline. Dr. Callery is Board-certified in Pathology with a sub-specialty in Forensic Pathology.

In its complaint the State alleges that, at all relevant times, Dr. Callery served as Chief Medical Examiner (CME) for the State of Delaware. In that capacity, he had responsibility for the oversight and management of the Delaware Office of Chief Medical Examiner (OCME). That office performed, *inter alia,* forensic testing of suspected illegal or dangerous drugs in the OCME Controlled Substances Unit (CSU). Other functions within the OCME were performed by the Death Investigation, Histology, Toxicology, DNA Analysis and Arson Investigation units.

The complaint alleges that, while serving as CME, Dr. Callery maintained a private forensic pathology consulting practice unconnected to his work for the State. In that private capacity Dr. Callery performed "private" autopsies and testified in depositions and trials as well as other types of hearing on behalf of private parties.

The State's complaint is a consolidation of two "counts". In the first count the State alleges that in late 2013 the State initiated an investigation into allegations that Dr. Callery was conducting his private forensic pathology consulting practice "during State time" and was using

State resources in violation of the State Employee Code of Conduct. The State further alleges that during a criminal trial in January 2014, an evidence envelope that was supposed to contain Oxycodone pills and which had been processed in the CSU lab had been tampered with. After further investigation it was determined that other drug evidence envelopes contained no drugs, or the contents of which had been replaced with other substances.

The State alleges that such findings prompted an "in-depth" and "comprehensive" investigation by the Department of Justice (DOJ) and Delaware State Police (DSP) into policies and procedures for the handling of drug evidence in the OCME. The investigation also pursued suspected diversion of drug evidence from the CSU lab as well as Dr. Callery's supervision and oversight of the OCME. Dr. Callery's conduct of his private pathology consulting practice while serving as CME was also the subject of a criminal investigation.

The State further alleges that in February 2014 Dr. Callery was suspended from his position as CME and was prohibited from participating in any case which had a potential to become a criminal prosecution.

The complaint alleges that investigators concluded that Dr. Callery had performed "work for private gain" during State working hours and had used certain State resources in performing that private work. The complaint lists the following specific findings of the investigation: (a) misuse of Dr. Callery's secretary in performing administrative tasks associated with his private consulting work and use of a State histologist to perform slide work on tissue samples related to "private" autopsies; (b) diversion of State file folders, papers, histology slides and use of a State computer in conjunction with Dr. Callery's private consulting practice, as well as use of a State storage facility to store private case files; (c) use of OCME autopsy rooms to conduct private autopsies, use of a State histology lab to prepare specimens, and use of State conference rooms

for meetings and depositions in conjunction with his "private" case; and (d) use of an assigned State vehicle for private travel.

The State further alleges that an Office of Management and Budget (OMB) investigation yielded additional findings against Dr. Callery. Those findings included the following: (a) participation in OCME matters in which Dr. Callery had a "private financial interest"; (b) providing assistance to private parties in OCME cases by obtaining unreleased autopsy records; and (c) acting as an expert or consulting witness in his private capacity in some cases "handled by the OCME".

The State alleges that in June 2014 the DOJ issued a joint report which included its drug diversion findings. The DOJ concluded that Dr. Callery had failed to effectively manage the CSU lab. That alleged failure of effective management resulted in an "environment" in which drug evidence was or could be "lost, stolen or altered". That in turn resulted in compromising the integrity of multiple criminal prosecutions. It is alleged that the DOJ further concluded that "conditions at the CSU Lab were the direct cause of the dismissal or reduction of nearly 300 drug charges". It is further alleged that the State was thereby caused to retain an outside lab to test drugs seized by Delaware law enforcement agencies.

The complaint alleges that in June 2014 the Governor signed legislation which abolished the OCME and created the Division of Forensic Science within the Delaware Department of Safety and Homeland Security. The complaint alleges that on July 4, 2014 Dr. Callery's State employment was terminated. The final factual allegation in "Count I" is that in June 2015 a warrant was issued for Dr. Callery's arrest on two counts of criminal Official Misconduct. Dr. Callery surrendered on that warrant immediately thereafter and entered a plea of "no contest" on certain charges.

Under the second "count" in the State's complaint, it is alleged that on June 11, 2015 Dr. Callery entered a "no contest" plea to two counts of misdemeanor Official Misconduct in violation of 11 *Del. C.* Sec. 1211(3). Pursuant to a plea agreement, Dr. Callery agreed to pay restitution to the State in the amount of $100,000, to surrender his Delaware medical license, and to not seek reinstatement during any period of court-imposed probation. The State finally alleges that in October 2015 Dr. Callery was sentenced to two years of Level 5 incarceration, all of which was suspended for five months of supervised probation, six months of unsupervised probation, and payment of the restitution. Dr. Callery was not ordered by the Court to surrender his medical license on the condition that he complete 500 hours of community service. The State alleges that the crimes to which Dr. Callery entered a plea of *nolo contendere* or "no contest" are deemed crimes "substantially related to the practice of medicine" under Board regulations.

Based on these allegations, the State alleges that Dr. Callery has violated four provisions of the Delaware Medical Practice Act. 24 *Del. C.* Ch. 17.

The formal hearing in March 2019 was preceded by an aborted commencement of the hearing on September 4, 2018. The hearing had been scheduled to begin in a truncated proceeding in the State Office Building in Wilmington at 9 a.m. on that date. Dr. Callery was then represented by Lawrence Cronin, Esq. It had been agreed by the parties prior to September 4 that a Stipulation of Facts would be submitted to the hearing officer and that the stipulation would constitute the parties' agreement on the operative facts in the case. The purpose of the hearing, as I understand it, was to offer the stipulation into evidence and then permit additional evidence from Dr. Callery regarding "mitigation". Hence, it would be left to this hearing officer

to form conclusions of law on the stipulated facts and to make a disciplinary recommendation, if warranted, to the Board.

Before Dr. Callery was sworn and permitted to testify on his own behalf on September 4, Ms. Plerhoples noted that the State would object to any testimony by Dr. Callery which was offered to "rebut" facts agreed to in the stipulation. Dr. Callery was then sworn and offered certain testimony which went beyond or which rebutted or refuted or was inconsistent with certain facts to which he had agreed in the stipulation. After Dr. Callery was permitted to testify for a time, a recess was taken. During the recess Dr. Callery conferred privately with his attorney.

When the hearing resumed, Mr. Cronin requested an "evidentiary hearing" on behalf of Dr. Callery. Mr. Cronin noted that Dr. Callery felt strongly about the facts underlying the related criminal matter and the allegations in the State's complaint. Mr. Cronin stated that Dr. Callery needed the opportunity to present all of the facts in the case.

Ms. Plerhoples joined in Dr. Callery's request. She argued that it was inappropriate for Dr. Callery to present extensive rebuttal of the limited facts in the stipulation. Ms. Plerhoples formally withdrew the State's consent to the terms of the stipulation. It was agreed by both parties that the stipulation (admitted earlier as Joint Exhibit 1) would be withdrawn and that its contents could not be used or referenced for any purpose in this case in the future. I returned JX 1 to the parties. It was further agreed that a full evidentiary hearing on the allegations in the State's complaint would be convened at the earliest convenience of the parties.

The actual hearing in this case was then preceded by certain pre-hearing proceedings which are summarized below. The hearing itself was convened at 9:05 a.m. on March 25, 2019 in the State Office Building, 820 N. French St., in Wilmington DE. The hearing was conducted

on due notice over a four day period during March 25-28, 2019. The State was represented by Zoe Plerhoples, Deputy Attorney General. Though he was initially represented by counsel in this matter, Dr. Callery elected to represent himself in pre-hearing matters and during the hearing itself. All witnesses testified under oath or affirmation. Registered court reporters were present during the hearing and made a stenographic record of the proceedings. This is the recommendation of the undersigned hearing officer after due consideration of all relevant evidence.

Pre-Hearing Matters

During the period between September 2018 and the formal hearing in March 2019, Dr. Callery made several applications or "motions" which were addressed as they were raised. In the first of those matters, Dr. Callery requested information pertaining to a law enforcement official whom the State intended to call as a witness. In an email to him from Ms. Plerhoples dated September 20, 2018, she stated that Det. John Laird of the Delaware State Police may be the sole witness to be called during the licensure hearing. In a responsive email of the same date, Dr. Callery asked Ms. Plerhoples to produce Det. Laird's curriculum vitae. Again, on the same date Ms. Plerhoples sent an email to this hearing officer asking for a pre-hearing conference on the matter.

A teleconference between Dr. Callery, Ms. Plerhoples and myself was conducted on September 27, 2018. The gist of the teleconference is summarized in an email from the undersigned to Dr. Callery and Ms. Plerhoples dated September 28, 2018. The State argued that Det. Laird would be called as a "fact" witness, not an "expert" witness. Dr. Callery argued that Det. Laird's anticipated testimony may qualify him as an "expert", as his testimony would go "beyond common knowledge" and because Laird has "unique skills and education".

Prior to the September 27 teleconference, Ms. Plerhoples had provided Dr. Callery with a judicial opinion in *Rooney v. DE Bd. of Chiropractic*. She argued that that 2011 Superior Court opinion stands for the proposition that pre-hearing "discovery" in a professional licensure case is not required by law. She added that if Det. Laird testifies during the hearing, Dr. Callery would have the right of cross-examination regarding his background. Ms. Plerhoples confirmed that she would not be asking Det. Laird for his professional "opinions" in the case.

After considering the arguments of the parties, I denied Dr. Callery's request. I found that the questions from a prosecutor to an investigating police officer does not call for expert testimony *per se*. Hence, the pre-hearing discovery of Laird's professional credentials is not required as a matter of law, nor necessary in order to ensure due process. So that the record in this case is complete, my email summarizing this dispute and setting forth my decision has been admitted into the record of this case as Hearing Officer Exhibit 1 ("HO X1").

A second teleconference followed a document request to the State from Dr.Callery. In an email dated October 1, 2018, Dr. Callery requested that the State produce three categories of information or documents: (1) the total mileage recorded on a State vehicle assigned to Dr. Callery during the period January 2008-December 2014; (2) the total mileage determined in the State's investigation to have been accumulated during Dr. Callery's "personal use" of that vehicle; and (3) correspondence or emails from Fleet Services to Dr. Callery which addressed his "personal use" of the State vehicle.

Ms. Plerhoples objected to Dr. Callery's requests and asked that a teleconference be convened to address them. A conference was convened on October 11, 2018. The gist of the arguments raised during that teleconference and my decision in the matter are summarized in an

email to the parties dated October 15, 2018. Again, for the sake of completeness of the record, my email has been admitted as H.O. X2.

Dr. Callery argued that the information and documents requested by him would show that the personal use which he had made of the State vehicle was in fact permitted. After the teleconference had moved to other matters best left for sworn testimony during the hearing, the parties were asked to refocus on the narrow issues raised by Dr. Callery. He asked if he could secure the requested documents or information through a request to the State under the Delaware Freedom of Information Act (FOIA), 29 *Del. C.* Ch. 100. He was told that he was welcome to file such a request with Fleet Services. Ms. Plerhoples argued that FOIA should not be permitted to secure "discovery" in a licensure case which is not otherwise available.

Dr. Callery reiterated that he needs the requested information in order to address claims of improper personal use of a State vehicle. Ms. Plerhoples argued that the State does not presently have in its custody the requested information or documents. She also argued that Dr. Callery should not be permitted to "relitigate" the facts underlying the criminal charges to which he entered a "no contest" plea.

After considering the arguments of the parties, I declined to order the State to produce the requested information or documents. The normal "discovery" rules applicable to civil proceedings in the Delaware Superior Court, for instance, are not applicable to a professional licensure hearing. Delaware judicial opinions have not held that there is a general right of pre-hearing "discovery" in a case such as this one. A hearing officer acting on behalf of a Delaware licensing board is without authority to engraft "discovery" rules upon the professional disciplinary process. At the end of H.O. X2, Dr. Callery was reminded that he has a right to ask that subpoenas for hearing witnesses and documents be issued by the Division of Professional

Regulation under the Medical Practice Act. 24 *Del. C.* §1734(d). Ms. Plerhoples represented that if Dr. Callery files such a request, the State may oppose it.

In an email dated October 15, 2018, Dr. Callery filed three new pre-hearing applications. The State opposed each of them. In a letter to the parties dated November 2, 2018, I summarized the arguments of the parties and provided my decisions on those applications. My November 2 letter is hereby admitted as H.O. X3.

In his first application, Dr. Callery asks that the State be precluded from making reference to "unsolved thefts of drug evidence occurring at the (OCME)" or Dr. Callery's conduct while "functioning as the Director of the Forensic Sciences Laboratory...." Dr. Callery argues that the FSL Director position is a "lay" position. Hence, functions performed by that Director are beyond the authority of the Board to regulate. In opposition to the application, the State argues that the Medical Practice Act provides for professional discipline if a licensee fails to adequately supervise those working under him. 24 *Del. C.* §1731(b)(10). In its complaint the State has alleged negligent supervision against Dr. Callery. Ms. Plerhoples also noted that certain acts, such as "crimes substantially related to the practice of medicine" may not be committed while practicing medicine and still provide a basis for professional discipline.

In H.O. X3 I decided to defer a decision on this application. The roles and relationships of various supervisory positions within the OCME had not been sufficiently factually developed in order to determine whether the Board has jurisdiction to consider whether they may form a basis for discipline as a matter of law. I also noted in H.O. X3 that either party has the right to object to certain testimony or exhibits if it is clear that such evidence goes to matters outside the purview of the Board.

In his second application Dr. Callery requests that the State's complaint be dismissed. He argues that he was not timely informed in 2014 of complaints filed before the Board against his medical license. Nor was he provided a timely opportunity to respond to complaints after an investigation was completed in 2015. He contends that his due process rights were violated since the events investigated occurred in 2008-2009 and he no longer has access to evidence which may be offered in his own defense. Relevant witnesses may have died or left State service. Other "evidentiary materials" may no longer be readily available.

In opposition to the motion to dismiss, the State provided a detailed chronology of events surrounding the investigations and complaints. Events which came to light in 2014 prompted a DOJ investigation of the CSU. The investigation prompted the State Solicitor to file a complaint against Dr. Callery with the Division of Professional Regulation in June 2014. Shortly thereafter the DOJ instructed the Division, as per statute, to suspend its investigation in deference to a criminal case filed against Dr. Callery.

In mid-2014 another complaint was filed against Dr. Callery which stemmed from the OMB investigation. Division investigators suspended their investigations until July 2016, when the Division was informed by the DOJ that the criminal matter had resolved. Approximately three weeks later Dr. Callery was informed by the Division of the filing of the complaints. In March 2017 an attorney acting on Dr. Callery's behalf responded to certain questions. In Spring 2017 these matters were assigned to Ms. Plerhoples. The licensure complaints were filed in September 2017. They were forwarded to Dr. Callery by the undersigned hearing officer in October 2017. The State contends that Dr. Callery was therefore on notice of the complaints and was able to respond to them.

The State referenced the "stand down" order from the DOJ to the Division of Professional Regulation. The State also argues that typically in administrative law there is no "statute of limitations" within which a licensure complaint must either be filed or forever barred. Dr. Callery retained counsel and responded to the complaints soon after he received them.

After considering the arguments of the parties, I denied the request that the complaints be dismissed in H.O. X3. There is no statute of limitations in Delaware for the filing of a professional licensure complaint. Nor does the equitable doctrine of "laches" typically apply. Certain delays in the processing of the relevant complaints were not unreasonable in context. Possible misconduct in the OCME was not discovered until 2014. Neither the Board nor the Division was responsible for any significant delays after January 2014. I determined that none of the described delays resulted in a violation of Dr. Callery's due process rights. In my decision I invited Dr. Callery to present any evidence he may have of "intentional neglect" in this matter by any State officials.

Dr. Callery's third application argues that had he known of the filing of the licensure complaints at an earlier date, he would not have accepted the State's plea offer in the criminal matters. He was not offered the opportunity to delay his plea until he had contested the claims made in the licensure complaints. Further, he argues that since the Board had input in the plea negotiations and did not object to the Court allowing him to retain his medical license, he did not expect that his license would be the subject of any further proceedings prosecuted by the State. When the Superior Court sentenced him on the Official Misconduct charges, it had "carefully evaluated" the matter but determined to take no action with regard to his medical license.

The State responds that any reference by the Superior Court to Dr. Callery's medical license at the time of sentencing is irrelevant here. Only this Board has the legal authority to

discipline a Delaware medical license. Dr. Callery knew or should have known that the crime of Official Misconduct has been deemed by the Board to be "substantially related" to the practice of medicine.

With regard to the argument that Dr. Callery would not have pled as he did had he had additional information, at the time of the plea he was represented by counsel. It is presumed that, before entering the plea, he was intellectually and legally satisfied that the State had sufficient evidence to convict him. Nor is it likely in the context of this record that the Board participated in forming the terms of his plea agreement, nor given any binding representation to Dr. Callery that licensure complaints against him would be dismissed in exchange for the plea.

On or about November 13, 2018, Dr. Callery filed a "motion" which contains eight points and is accompanied with exhibits. The arguments in the November 13 application either request that certain evidence be excluded from the hearing, or that certain claims made in the complaint be dismissed. The State has filed opposition to the points raised in the application.

Dr. Callery first argues that he had previously documented the fact that he was CME, the office was underfunded and not adequately "supported". After he left the office, his successor quit because of the "same problems". In addition, he notes that the office was moved from the organizational structure of the Department of Health and Social Services and was placed under the Secretary of Homeland Security. The State responds that Dr. Callery may introduce relevant evidence of these facts during the hearing.

In his second point Dr. Callery reiterates that the lack of State support for the OCME resulted in a "predictable systemic failure". He had made his concerns known to others. Again, the State conceded that Dr. Callery should be permitted to present evidence on the point and to argue its relevance.

The third point in Dr. Callery's November 13 motion argues that he should not be held responsible for misconduct of certain OCME officials whom he did not "routinely interact with and supervise". He adds that there is no factual basis on which the State may contend that individuals who reported to him were inadequately supervised. The State contends that this contention is "argument", and should be reserved for the hearing.

In his fourth point Dr. Callery's Lab Manager Supervisors in the OCME at the time had not reported any mishandling of drug evidence, nor "suspicious behavior". Dr. Callery's office was in a separate building. He did not monitor evidence technicians at the time of drug intakes or releases. The State responds that Dr. Callery should be permitted to introduce evidence which supports those contentions.

The fifth point argues that the complaint has mischaracterized Dr. Callery's performance of "private" forensic work. Dr. Callery argues that at all times he applied his professional judgment and chose those hours of the day when he would perform medical procedures based on the needs of the OCME. He asks for a pre-hearing ruling that any argument that he was personally negligent "due to not working 37.50 hours per pay" therefore be precluded. The State again responds that Dr. Callery's claim is argument, and should be made in the context of the hearing.

In his sixth point Dr. Callery contends that certain evidence which had been tampered with was handled by persons not employed in the OCME months or years before tampering was discovered. He adds that no one employed by the OCME during his years as CME had been charged with theft of evidence. There is no evidence which shows that his conduct was the cause or contributing factor in regard to missing evidence. The State responds that the contention is argument and should be made during the hearing.

In his seventh point Dr. Callery reiterates that cases of miscounting or misidentification of drug evidence did not involve him or any OCME employee. He adds that such events can occur at "other points in the chain of custody", both prior to OCME intake, or after release of evidence to other agencies. The State repeats its reponse that the claim is argument and should be made during the hearing.

Finally, in his eighth point Dr. Callery that this "drug evidence fiasco" has destroyed his 30-year career. He has been scapegoated. He had warned others of a "crisis" in the Controlled Substances Unit. He did not steal any evidence, nor did others reporting to him do so. Thieves have not been identified. The State made its running response that this argument should be reserved for the hearing.

In response to the points raised in Dr. Callery's November 13, 2018 "motion" and the State's responses, I issued a lengthy decision in the form of an email dated November 29, 2018. That email summarizes the arguments of the parties and my rulings. It has been admitted as H.O. X4. Since Dr. Callery is not a law-trained professional, my email first explained a number of evidentiary rules or concepts applied during licensure hearings. I further stated that to the extent that any of Dr. Callery's November 13 requests constitute "argument" on relevant evidence, he will be permitted to introduce such evidence during the hearing and to argue what he believes that evidence proves or disproves in the context of this case.

Among other things Dr. Callery will be permitted to introduce evidence on the State's "supervision" claim, and the State will be permitted to introduce contrary evidence. That evidence may include facts pertaining to the handling of evidence at relevant times in the OCME as well as Dr. Callery's physical remove from those actitivities.

Attached to Dr. Callery's November 13 is a "Sentencing Memorandum" submitted to the Superior Court in conjunction with the criminal proceedings. I noted that the memorandum constitutes advocacy by Dr. Callery's criminal defense attorney. I also noted that at this pre-hearing stage I was not in a position to admit the document or rule on its relevance until its context is explained by Dr. Callery or another witness testifying on his behalf. With regard to Dr. Callery's argument that he was neither the "cause nor contributing factor" in regard to the OCME "environment" described in a June 2014 investigative report, I found that it was premature to rule on the admissibility or relevance of the document in the absence of a full evidentiary record on the point.

As to Dr. Callery's argument that there is no factual connection between Dr. Callery's conduct as CME and the miscounting or misidentification of drug evidence, I simply noted that the State would be permitted to introduce relevant evidence on the alleged "connection", and Dr. Callery would be permitted to introduce evidence refuting that claim.

In summary, my November 29 email (H.O. X4) informed the parties that I was not ruling on the admissibility of inadmissibility of evidence at that point. In short, the case would not be "tried" through an exchange of emails. That is the purpose of a full-blown public hearing.

The final pre-hearing proceeding was a conference with the parties during which certain exhibits were offered for pre-admission. The purpose of the conference was to admit non-objectionable documents in order to render the hearing more efficient.

On behalf of the State, Ms. Plerhoples offered an exhibit containing 110 pages and comprising a number of documents. The State's formal licensure complaint was admitted as SX 1 at 1-6. An administrative complaint filed by the State Solicitor against Dr. Callery on June 30,

2014 was admitted as SX 1 at 7-11. An email from the State Solicitor of the same date and addressed to the Division Investigative Supervisor was admitted as SX 1 at 12.

The State further offered an investigative report captioned "Investigation of Missing Drug Evidence: Preliminary Findings". Ms. Plerhoples noted that the report had been attached to the State Solicitor's administrative complaint. Dr. Callery objected to admission of the report. He argued that related criminal proceedings were not relevant. He was not charged with the theft of any drugs. His plea in the criminal matter did not concern missing drug evidence.

Ms. Plerhoples agreed that Dr. Callery had not pled "no contest" to charges of drug theft. Nonetheless, the report touches on missing evidence from the OCME as well as negligent supervision by Dr. Callery. In addition, the State alleges that Dr. Callery made personal or private use of State property. The State will prove that two OCME employees were involved in mishandling evidence, though neither employee was convicted of such behavior. Insufficient supervision of others may be a form of misconduct under 24 *Del. C.* §1731(b)(10).

Dr. Callery argued that the "index case" in these proceedings concerned drug evidence with a 20-month chain of custody, only two of which were in the OCME. Ms. Plerhoples responded that the State will call the author of the investigative report to testify. He will substantiate his conclusions. Dr. Callery responded that while one OCME was charged with possession of a small amount of marijuana, neither he nor another individuals were charged with theft from the OCME. Ms. Plerhoples agreed with that assertion. Dr. Callery conceded that the two were "suspects" in an investigation. Based on a fair reading of 24 *Del. C.* §1731(b)(10), the investigative report was admitted as SX 1 at 13-49.

An investigative report dated June 24, 2014 and authored by Monica Gonzalez-Gillespie, Director, Labor Relations and Employment Practices, Office of Management and Budget (OMB)

was admitted as SX 1 at 49-76. A February 7, 2017 memorandum from Jean Betley, Division of Professional Regulation investigator, to Michele Allen, Esq., then counsel for Dr. Callery, was admitted as SX 1 at 77-78. A letter to Ms. Betley from Ms. Allen dated March 15, 2017 was admitted as SX 1 at 79-81. Certain certified records maintained in the Superior Court were admitted as SX 1 at 82-90. A Delaware State Police report dated June 26, 2015 was admitted as SX 1 at 91-110.

Dr. Callery then offered certain records into evidence. The above-described "Defendant's Sentencing Memorandum" filed with the Superior Court and dated September 11, 2015 was admitted as Respondent's Exhibit 1 ("RX 1"). (Ms. Plerhoples stated that its author, Edmund Daniel Lyons, Esq., is now employed in the Department of Justice. She has not discussed this case with Mr. Lyons.) A "Defendant's Supplemental Sentencing Memorandum" dated September 30, 2015 and also authored by Mr. Lyons was admitted as RX 2. A "Presentence Report" also filed in the Superior Court and containing 78 pages was admitted as RX 3.

A November 9, 2015 electronic message from Dr. Callery to a number of addressees and represented by him as a "self-report" by him to the Board was admitted as RX 4. Another "self-report" from Dr. Callery dated November 7, 2015 was admitted as RX 5.

Dr. Callery offered a collection of letters of reference addressed to the Superior Court in 2015. The collection was admitted as RX 6. A brief letter from "Bowling Green Brandywine" dated January 23, 2019 and without an addressee was admitted as RX 7. A letter from Deborah J. Moreau,

Esq., Delaware State Public Integrity Commission counsel, and dated January 8, 2019 and attached to certain documents produced to Dr. Callery in response to a subpoena *duces tecum*, was admitted as RX 8.

During the hearing Ms. Plerhoples, on behalf of the State, indicated that she would object to any document offered by Dr. Callery which would constitute a collateral attack on his criminal convictions. Similarly, the State will object to testimony and the admission of any documents which describe conditions in the OCME or its successor entity after the date of termination of Dr. Callery's State employment. For instance, the State will object to the admission of the State's "time off" policy for 2018-2019, current policies regarding the performance of "private" autopsies, and current policies on the use of the former OCME premises for conducting such activities. She added that the State will not object to evidence in mitigation or character evidence offered by Dr. Callery. At the close of the January 7, 2019 pre-hearing conference the parties discussed potential witnesses who may be called to testify during the hearing.

The Administrative Hearing

The hearing convened on March 25, 2019 at 9:05 a.m. in a conference room in the State Office Building, 820 N. French St., Wilmington DE. Ms. Plerhoples was present on behalf of the State and Dr. Callery had elected to participate in the hearing *pro se*. A court reporter was present.

After describing certain procedures which would govern the hearing, the parties were permitted to give opening statements. Ms. Plerhoples stated that in this case the State will prove that in 2015 Dr. Callery entered a plea of "no contest" on two counts of the crime of Official Misconduct. The Board had deemed such criminal conduct as "substantially related to the practice of medicine". The State will object to any effort by Dr. Callery to "relitigate" the

circumstances surrounding his pleas in those cases. In addition, the State will prove that, while CME, Dr. Callery failed to supervise those employed in his office.

Dr. Callery stated that he was a State employee for 25 years. His medical license has never been disciplined. The evidence in this case will show that there was no theft in this case of drug evidence from the OCME. Nor will it show that any OCME employee under his supervision had engaged in misbehavior. He had competent subordinates supervising the Controlled Substances Lab. No personal failing by him led to missing evidence. Dr. Callery added that he would present relevant evidence regarding certain private engagements while CME. Finally, he stated that his *nolo contendere* plea in the Superior Court was based on personal finances and the well-being of his family.

The State first called Lt. Robert Wallace. He is presently a Delaware State Police officer assigned to the Division of Gaming Enforcement. He has been a State Police officer since April 1998, during which time he has served as a patrol officer, criminal investigator, Governor's Task Force member, and has overseen the Drug Unit at Troop 3. During the period 2014-2015, Lt. Wallace was Officer-in-Charge of the Special Investigations Unit of the Governor's Task Force. He has been trained in the Delaware Police Academy and has had special training in report-writing and in investigations.

Lt. Wallace participated in the investigation of Dr. Callery and the OCME in 2014. He authored the police report at SX 1 at 91 *et seq.* He reviewed that document to prepare for his testimony here. He is also familiar with the DOJ and OMB investigations in 2013-2014. He became involved in the DOJ investigation in May 2014. His investigation began when employees in the OCME reported problems in that office.

Lt. Wallace has also reviewed the "Investigation of Missing Drug Evidence" report at SX 1 at 13. He was consulted in the preparation of that report by the DOJ. The conclusions in that report were informed by his investigation and conclusions. Lt. Wallace identified the OMB report at SX 1 at 50 *et seq.* He had seen it before. He did not participate in writing it.

His police report (SX 1 at 91) stemmed from the investigation in which he was an investigator and supervisor of others. Lt. John Laird of the DSP also participated. He interviewed certain OCME employees. At this point Dr. Callery asked if he could *voir dire* the witness. The request was denied on account of the fact that Lt. Wallace was not offered as an expert witness. Dr. Callery was informed that he would have the full opportunity to question Lt. Wallace on his background.

During the investigation in this case Lt. Wallace interviewed in excess of 100 individuals. Some were interviewed on multiple occasions. Both present and former OCME employees were interviewed. Lt. Wallace also spoke with Dr. Callery's attorneys. He reviewed documents maintained by the OCME and by the Department of Health and Social Services. Documents included lab reports, "comp time" reports, personnel files, State emails, and Dr. Callery's private consulting case records. With regard to the claim of personal use of a State vehicle, he reviewed GPS records to determine where the car had been driven.

As stated at SX 1 at 94, the investigation began when a police officer was testifying in a Kent County criminal trial in January 2014. When the witness opened a pill container while on the stand, the contents differed from those he had placed in the container at or near the time of arrest. Another officer experienced a similar problem. It was determined that the drugs went missing when they were in the custody of the OCME. It was determined that problems with some drug evidence would affect pending criminal cases.

Lt. Wallace visited the OCME. There he found an antiquated key fob system used for access to the drug locker. A door to an evidence room had been propped open. Cameras were not fully functional. There were discrepancies between evidence logs and the amount of actual drugs present. Some employees were not aware of all applicable policies. Lt. Wallace confirmed problems noted in the DOJ report at SX 1 at 12. Lt. Wallace also reviewed contract records, tax returns and a timeline for the period 2009-2014. Among other things, investigators were searching for misuse of State property and for information regarding Dr. Callery's private consulting practice.

Investigators also spoke with Carmen Nazario and Vincent Meconi, former Department of Health and Social Services (DHSS) Secretaries. The former had no recollection of Dr. Callery's private consulting work. Secretary Meconi was aware of his private practice. However, he had insisted that such work be performed on Dr. Callery's own time.

Lt. Wallace's investigative conclusions or "results" begin at SX 1 at 96. He found that Dr. Callery had engaged in a pattern of using State resources for his own private gain. He gave several examples. They include private use of a State vehicle, use of OCME phones, use of an OCME fax line, use of OCME facilities to store documents and slides generated in his private practice, use of an OCME conference room for depositions and meetings, use of an OCME lab to examine specimens, use of State personnel to assist on private cases, use of State personnel to take "private" calls, and use of OCME employees to perform "private" autopsies. Lt. Wallace read the paragraph in his report at the bottom of SX 1 a 96 to the top of SX 1 at 97 to list these findings.

Lt. Wallace testified in regard to instances from 2009-2014 in which Dr. Callery had used an assigned State vehicle to travel outside Delaware in his private consulting practice. He

reviewed Dr. Callery's trial and deposition list and cross-referenced it with "Google searches", documents and other information from Dr. Callery's Palm Pilot, as well as GPS records. The investigation was performed by Lt. Wallace, Lt. Laird, and other officers as needed. The investigation determined that Dr. Callery was spending "excessive" time on his private consulting business. Lt. Wallace stated that Dr. Callery had not provided any memos to Secretary Nazario or Secretary Meconi regarding his private use of the State vehicle.

Ms. Plerhoples asked Lt. Wallace to testify in regard to the reference to dissemination of a "cooperating witness" file at SX 1 at 105. He stated that investigators learned that an OCME personnel file had been accessed by Dr. Callery's assistant (Ms. Hopper) at the request of a death investigator, Brian McCarthy. McCarthy wanted the personnel file of an interviewee who was providing information. The significance was that McCarthy had a private relationship with Dr. Callery. Investigators wanted to determine whether efforts had been made to impugn the credibility of the OCME employee. McCarthy denied that Dr. Callery had asked him to get access to the file.

As referenced at SX 1 at 107, it was learned that Dr.Callery had been retained by a private attorney to determine the condition of the liver of a decedent in a worker's compensation case. Dr. Callery was subsequently retained as an expert witness in that case. Hence, it was determined that Dr. Callery and the attorney were communicating before a decision had yet been made by the OCME on cause of death in the case.

In another case Dr. Callery had been asked for autopsy records by a private attorney. Investigation of the case was ongoing. The attorney stated that he had filed suit on behalf of his client. Dr. Callery forwarded an email to an OCME employee. Dr. Callery was found to have deleted a sentence from a report about having been retained as an expert.

Lt. Wallace testified in regard to findings of violation of State laws which are referenced at SX 1 at 106. State employees are prohibited from having an interest in a private enterprise which is in substantial conflict with State duties. Lt. Wallace made mention of Dr. Callery's use or theft of State property. It was determined that Dr. Callery had conducted his private consulting business to such a degree that it interfered with his duties as CME. There had been "systemic operational failings" in OCME in which drug evidnence could be lost, stolen or altered. The failings included lack of management or oversight, lack of security and lack of effective policies. In one instance Dr. Callery testified on behalf of a private client and questioned the opinions of an Assistant Medical Examiner, despite the fact that the AME was a supervisee. *Id.*

The outcome of the investigation was forwarded to the DOJ. As a result of the findings, Dr. Callery was charged with Official Misconduct. He subsequently entered a plea of "no contest" on two misdemeanor counts of that offense.

Dr. Callery then cross-examined Lt. Wallace. Before being employed by the DSP, Lt. Wallace earned a baccalaureate degree and engaged in part-time employment. In order to be hired by the DSP, Lt. Wallace took written and fitness tests, underwent a background investigation, was polygraphed and responded to drug use questions. He has never been disciplined by the DSP for dishonesty. This case was an important investigation in Lt. Wallace's career. It was one of the "most important crime lab cases in the U.S."

With regard to the drug investigation portion of the case, in February 2014 the DSP took control of the OCME evidence vault by padlocking the door. The investigation began in May 2014. At certain relevant times CSU Lab Manager Farnam Daneshgar was in charge of taking in drug evidence. He prepared a report for investigators. A cross-check of evidence was

performed. Evidence was taken to DSP Troop 2 and logged in there. A total of over 9,000 exhibits were moved. Lts. Wallace and Laird oversaw the evidence relocation effort. When the evidence was moved, no specific protocol was followed. Those involved relied on DSP policies in conjunction with the move. Once at Troop 2, the evidence was examined to check for tampering. Only sworn officers were involved in the task.

Lt. Wallace was asked about some of the "potentially compromised" cases described at SX 1 at 43-48. The Tyrone Walker case was the trial during which a police witness discovered evidence tampering while on the witness stand. Lt. Wallace talked with the witness-officer. He opened an evidence envelope on the stand, noticed the discrepancies, and informed the relevant Deputy Attorney General. Lt. Wallace has testified in drug cases. He has opened evidence envelopes in court. Typically a prosecutor will ask an officer to authenticate the envelope and its contents. He is aware that in one case a "small count" was discovered later but that count was "covered up".

The OCME uses a specially colored tape on envelopes. A question may arise if that color tape is not on an envelope. With regard to the 46 cases listed at SX 1 at 43 *et seq.* Lt. Wallace did not know how many of the exhibits in question had been in the OCME vault in February 2014.

"Chain of custody" is important in drug cases. After seizure of drugs, officers typically field-test material. Thereafter, the drugs are placed in a sealed envelope and are transported to the OCME. The evidence is then logged in. Technicians at the OCME assign a control number to an exhibit. From a temporary location the evidence is then placed in a permanent evidence area.

When evidence is taken in at OCME, testing and logging in are performed. Evidence is signed in at OCME. Seals are checked and recorded. The evidence is then placed in the OCME vault. Later the same office or a different officer may pick up the evidence for use at trial. A long time may pass between seizure and trial. The evidence may be located in multiple venues over time. With regard to the 46 cases listed in SX 1, Lt. Wallace could not state where tampering had occurred. Nor could he testify as to whether any of the cases resulted in indictments for stealing drugs while in custody.

Lt. Wallace testified that [redacted] an OCME employee, was indicted for tampering with or stealing drugs. He was also indicted for improper access to DelJIS in that he accessed his own information. Lt. Wallace added that ultimately [redacted] was not convicted for theft of cocaine evidence. Lt. Wallace agreed with Dr. Callery that there was no proven connection between OCME employees and drug thefts during the period 2008-2014. He added that it is difficult to state exactly where thefts or tampering occurred.

Dr. Callery then took Lt. Wallace through a number of the 46 cases of "potentially compromised evidence" listed at SX 1 at 43-48. An objection to the inquiry onn the basis that this case concerns only Dr. Callery was overruled. Of the 16 cases represented to Lt. Wallace as having been DSP cases, Lt. Wallace testified that he was not prepared to discuss them in depth. The State therefore again objected to the questioning.

Dr. Callery asked Lt. Wallace if any of the 46 listed cases were part of the 9,000+ exhibits moved to DSP Troop 2. Lt. Wallace could not identify which of the cases were part of the larger number. Lt. Wallace was asked to review the summaries of the 46 cases. He did so and then testified that none of the 46 cases were part of the 9,200 cases moved to and inventoried at Troop 2. None taped with evidence tape used at OCME were on the list of 46. Lt. Wallace

added that all of the drug exhibits found to have been tampered with were located in "agency lockers".

Lt. Wallace has not had experience in the weighing of marijuana evidence. He conceded that such evidence is typically heavier when seized than when dried out. He agreed that in some of the 46 cases mentioned in his report marijuana weights had decreased. When asked, Lt. Wallace stated that the weight loss in Case No. 13 (three pounds) could not be explained by drying. He does not know who discovered the weight loss in that case. Lt. Wallace admitted that he was unaware of the initial weight of that evidence. The Wilmington Police Department (WPD) may have weighed it. Lt. Wallace is not aware whether the WPD was instructed by DSP to follow certain protocols.

Lt. Wallace was asked about other cases on the list in his report. Some others are from WPD, and some from the New Castle County Police Department (NCCPD). Lt. Wallace admitted that evidence packing materials may affect weight. He agreed with Dr. Callery that the case summaries do not reference "submitted weights". He agreed that eight pounds missing from a 500 bale of marijuana due to a "chopped off corner" may be evidence of theft. Lt. Wallace added that if there is evidence of "gross tampering" when an officer appears to retrieve an exhibit, the evidence will not be taken back by the officer. He again admitted that marijuana may lose weight over time.

In Case Nos. 3, 4, 5 24, 34, 38 and 45 on the summary list, evidence was not analyzed by the OCME. Lt. Laird and Mr. McCarthy stated that many of the exhibits may not have been so analyzed. He added that Mr. Daneshgar would not release to police a drug exhibit which had "obviously" been tampered with. In some cases it depends on the "tradecraft" of the tampering.

Some tampering is difficult to detect. It is "standard of practice" to check for tampering. In the 46 cases listed in the report, the tampering was discovered in police evidence lockers.

Lt. Wallace opined that evidence custody at OCME was "pretty good". There was no evidence missing from the 9,200 exhibits transferred from the OCME vault to Troop 2. He did not recall whether the DSP has been involved in a case in which the number of heroin bags had changed in an exhibit. He then testified that he is not aware of any cases in which a count had differed. Scott McCarthy is now retired from the DSP. During the period 2009-2014 he was the Sergeant in charge of the evidence unit at Troop 2.

Of the 46 cases listed in his report, none were tampered with while evidence was housed at the OCME. Lt. Wallace testified that he can not say, beyond a reasonable doubt, who tampered with the evidence in those cases, nor where the tampering occurred. The State objected to the questioning regarding level of proof on the basis that the questions called for legal conclusions. When asked whether he could name anyone who had stolen drug evidence, Lt. Wallace stated that those who were indicted and charged had done so.

[redacted] was an OCME death investigator who was charged. He had been a University of Delaware security officer and a New Castle City police officer before being hired at OCME. Lt. Wallace could not say that [redacted] was involved in all 46 cases of tampering. Evidence was insufficient to charge OCME employees in the cases.

Ms. Plerhoples examined Lt. Wallace regarding Dr. Callery's alleged misuse of State property. He stated that Dr. Callery's job as CME allowed him to claim "comp time". Under OCME arrangements, Dr. Callery was permitted to claim three hours for performing an autopsy and 1.5 hours for a body exam. Three hours were credited in any autopsy, even if a particular one consumed less time.

During his questioning of Lt. Wallace, Dr. Callery occasionally inserted facts or factual assertions in his questioning. The State objected to that form of questioning. Several objections by the State were sustained. Since the improper form of questioning continued, at this point in his examination of Lt. Wallace, Dr. Callery was placed under oath so that his assertions would be sworn.

Lt. Wallace stated that Dr. Callery was required by the Department of Health and Social Services to work 37.5 hours per week. That averaged 7.5 hours per day, unless Dr. Callery had been permitted to shift his schedule.

Dr. Callery asked Lt. Wallace how it had been determined that Dr. Callery had "stolen" approximately $100,000 in State time and property. Lt. Wallace stated that the amount was calculated from facts determined in the investigation. At this point the State's attorney objected to Dr. Callery's attempt to "relitigate the criminal case" when he had entered a plea of no contest to the Official Misconduct charges. She argued that Dr. Callery should be collaterally estopped from trying to reopen the criminal matter when he had agreed to a "plea bargain" offered by the State. Dr. Callery voluntarily entered his plea, and thereafter had not asked the Court for permission to withdraw it. This hearing officer instructed Dr. Callery that his plea to the charges settled the criminal case, and it would not be subject to a "collateral attack" since the State had offered certified court records which proved the occurrence of the plea.

Lt. Wallace does believe that Dr. Callery "stole" State time while employed as CME. Dr. Callery traveled outside Delaware to engage in private forensic consulting work. He did some of that work on State time, rather than on his own personal vacation time. Lt. Wallace testified that Dr. Callery did not work all required "State hours" while CME. In response to Dr. Callery, Lt. Wallace conceded that he had a degree of flexibility in his work schedule. However, and by

way of example, if Dr. Callery worked only 2.5 hours on a given day, he was "stealing" State time depending on the other hours which he dedicated to his State job during that week.

With regard to Mr. [redacted], they were charged with certain drug offenses after their homes were searched. One search of [redacted] home yielded marijuana and drug paraphernalia. Lt. Wallace agreed that the drugs found in the search were not traceable to the OCME. [redacted] was eventually convicted on a charge of unauthorized DelJIS access, not drug theft. Lt. Wallace is aware of the fact that no OCME employee was convicted of drug theft from the OCME.

Lt. Wallace was questioned regarding a trip by Dr. Callery to Colby College in Maine. The matter is discussed in his police report at SX 1 at 104. Lt. Wallace is aware that licensed Delaware physicians are required to complete a certain number of continuing medical education hours during each license renewal period. Dr. Callery was paid to moderate a conference at Colby College one night at 7 p.m. while he was being paid as CME. Dr. Callery gave Lt. Wallace a syllabus of the Colby conference. Lt. Wallace testified that Dr. Callery set up his own work schedule. He added that speaking at a conference in Maine at 7 p.m. was not acceptable if it conflicted with Dr. Callery's work schedule as CME. Lt. Wallace's conclusion does not change if the speaking or moderating responsibilities were scheduled for 7 p.m.

Attendance sheets for a number of years for the Colby conference were requested but not received by investigators. In 2011 Dr. Callery used his assigned State vehicle to travel to Maine. That use of the vehicle had not been approved in 2011 by State Fleet Services.

Lt. Wallace testified that he had no knowledge of Dr. Callery's involvement in the dissemination of the contents of a witness' personnel file. A "Ms. Monahan" was a source in

the investigation. Though she had some value as a witness, she was not more "special" than other witnesses.

Lt. Wallace was asked by Dr. Callery if the OCME "comp time" protocol was "problematic". He testified that the policy for accrual of such time by Dr. Callery and Assistant Medical Examiners was "fine". Dr. Callery's time was kept initially by [redacted] his Administrative Assistant. It was then kept by [redacted] due to certain problems in Ms. [redacted] time-keeping. Investigators found problems with Dr. Callery's sign-off on time records maintained by [redacted] when his time was compared with Department documents.

Dr. Callery questioned Lt. Wallace about his use of a State vehicle in travel to Connecticut. SX 1 at 98. Apparently Dr. Callery was paid $254.70 for his mileage to and from that state though he had used a State car. Lt. Wallace does not know whether Dr. Callery reimbursed the State for mileage on the car for that trip. Dr. Callery provided an email to Lt. Wallace which had been authored by a Connecticut physician. Lt. Wallace was not aware that Dr. Callery had performed grand rounds in a Connecticut hospital on a particular trip, and that the trip had been preapproved.

Dr. Callery's curriculum vitae is mentioned at SX 1 at 97. He asked Lt. Wallace if non-Delaware medical work should have been recorded on his CV. Ms. Plerhoples objected to the question and noted that if out-of-state work was not reflected on the CV, that omission is relevant to the State's claim of "theft" of State time. Lt. Wallace does not believe that Dr. Callery had fabricated his CV. It does list his privileges at a Jennersville PA facility for a certain period of time. Lt. Wallace testified that all hospitals listed on the CV were contacted. No documentation was received regarding the suspending of any of Dr. Callery's hospital privileges.

Lt. Wallace is aware of what constitutes an autopsy. He is also aware that private autopsies were performed at OCME during Dr. Callery's tenure as CME. Physicians were assisted by others. Lt. Wallace is not aware of Dr. Callery's communications with the Public Integrity Commission. Dr. Callery was interviewed by the OMB, but Lt. Wallace had not read transcripts or records of those interviews.

Lt. Wallace agreed that histology (micro examination) is performed in conjunction with autopsies. He had interviewed an OCME histologist who had prepared certain slides in conjunction with Dr. Callery's "private" autopsies. The histologist was paid by Dr. Callery by draft. Lt. Wallace testified that Hal Brown had instructed the histologist to perform such work "on her own time". The histologist would spend several hours on some slides. Lt. Wallace is not aware of the number of private autopsies performed by Dr. Callery per year. Lt. Wallace also interviewed certain dieners (morgue assistants) who had worked with Dr. Callery. Lt. Wallace believes that Dr. Callery used some State-supplied slides for some private autopsies.

Dr. Callery then questioned Lt. Wallace about a trip taken by Dr. Callery to Kennett Square PA. Dr. Callery offered a map to Lt. Wallace which was marked for identification as RX ID B. Bowling Green in Kennett Square is a substance abuse rehabilitation facility. Lt. Wallace is not aware of the facility's access policies. When GPS data for the trip was reviewed, Lt. Wallace testified that he could not testify that any detours were taken by Dr. Callery during the trip. A letter (RX 7) from an employee at Bowling Green stating that Dr. Callery had never been a patient there was shown to Lt. Wallace. Lt. Wallace agreed that another individual may have driven the car to that location. Other State employees also had access to Dr. Callery's assigned State vehicle. Lt. Wallace does not know why Dr. Callery lost privileges regarding the car.

Investigators reviewed records of Dr. Callery's trips on Amtrak during the period 2009-2014. The records established when Dr. Callery had left and then returned to Delaware. They also established times when Dr. Callery was performing private consulting work. Dr. Callery asked Lt. Wallace if Amtrak trips could have been taken to New York for operas. Lt. Wallace was unaware of what trips were for that purpose versus private consulting.

Dr. Callery cited a reference in the police report to a case in which Dr. Vershvovsky performed a review of a case concerning background information on the condition of a decedent's liver in a worker's compensation case. SX 1 at 107. In that OCME case Dr. Callery had a private interest and was retained to testify on behalf of the decedent's estate in a petition for death benefits. Lt. Wallace stated that the case did not involve a legal violation by Dr. Callery. However, the incident was referenced in the police report because Dr. Callery had been contacted by private attorneys before the OCME had finished its work in the case and had been asked for favorable information regarding the decedent's claim.

In another death case in the OCME the office was withholding information due to a criminal investigation. An attorney contacted Dr. Callery and asked that information be released because the case was "straight forward" and suit had been filed. Dr. Callery forwarded the attorney's email elsewhere in the OCME after deleting reference in the email to the fact that the attorney intended to retain Dr. Callery as a privately retained expert witness in the matter. *Id.* Dr. Callery asked Lt. Wallace if anything "illegal" had occurred. An objection to the question was sustained on the basis that it called for a legal conclusion.

Dr. Callery asked Lt. Wallace if he, Dr. Callery, had release confidential information. Lt. Wallace responded that the issue is discussed in the OMB report. SX 1 at 49 *et seq.* The OMB had concluded that Dr. Callery had accessed confidential information for personal gain. Lt.

Wallace testified that he personally does not have evidence that Dr. Callery did so. Dr. Callery did remove some personal files. Investigators found extensive files in bankers' boxes and removed them. Dr. Callery kept such files in three offices. Lt. Wallace could not establish how many times Dr. Callery permitted the use of OCME facilities for depositions in litigation.

Lt. Wallace was asked whether Dr. Callery's use of OCME telephones was illegal. He said there had been a high volume of calls to Dr. Callery at OCME. That may demonstrate misuse of State resources. When asked what was a "high volume", Lt. Wallace stated that Ms. Hopper determined that 78% of telephone messages for Dr. Callery were private. Ms. Plerhoples objected to questions to Lt. Wallace about findings in the OMB report.

Lt. Wallace was referred to SX 1 at 99 in the police report. Reference is made there to the fact that three of four calls to Dr. Callery were "private". Lt. Wallace stated that whether his private calls were "excessive" must be determined by comparing their number with State business calls. Lt. Wallace agreed with Dr. Callery that Dr. Callery's private emails did not exceed two per day, on average.

As to State stationery, it was determined that Ms. Hopper created private case files for Dr. Callery on State stationary. She printed case files to the paper per Dr. Callery's direction. Dr. Callery also printed his CV on State letterhead. That was wrong because he was creating the CV for his private consulting business. During the period 1994-2004 Dr. Callery also used other paper for his CV which bore his home address.

Dr. Callery asked Lt. Wallace if he had contradicted other forensic pathologists at OCME. The witness answered in the affirmative. In one case Dr. Callery testified for a private client in contradiction of Dr. Tobin in the OCME Sussex County office. Lt. Wallace read of that

occurrence in media coverage of the case. The claim was not corroborated by ordering transcripts of testimony.

With regard to "private" use of his assigned State vehicle, Dr. Callery on occasion parked the vehicle elsewhere than the OCME lot. He had parked it at Amtrak, his home, Bowling Green and other places overnight. Lt. Wallace could not provide the dates when that occurred. He is aware that some State employees are permitted to take their State cars home. He did not know when Dr. Callery was permitted to do that. Investigators did not have documents which established such permission. He added that Dr. Callery did not drive the car home to or through Pennsylvania regularly.

With regard to the OCME Controlled Substance Unit, Carolyn Harris was in charge on a day-to-day basis. She was absent for a time for medical reasons. Hal Brown supervised Ms. Harris as Deputy Director of OCME under Dr. Callery. Ms. Harris supervised others in the Evidence Unit. Dr. Callery was physically located in a different office. A question as to whether Dr. Callery could supervise these individuals from his office was objected to on the basis that the question called for speculation. The objection was sustained. Lt. Wallace confirmed that it was not possible to see certain other offices from Dr. Callery's office.

Reference is made in the police report to the claim that this case was "arguably one of the worst crime lab scandals in the history of the United States." SX 1 at 109. Dr. Callery asked Lt. Wallace what other cases he using as comparisons. He mentioned a case in Masssachusetts. He could not recall other "scandals". He is aware of an FBI case, and perhaps one in Chicago. The State objected to this inquiry. Lt. Wallace can only testify about the impact of this case on Delaware. Lt. Wallace admitted that he used the phrase "one of the worst...." He did not

consider a list of scandals, or have details of other cases. In response to the hearing officer, Lt. Wallace admitted he was using hyperbole. He wanted to emphasize the impact of the case.

In the same paragraph on SX 1 at 109, Lt. Wallace characterized Dr. Callery as evidencing "self-absorption" in his private practice. Dr. Callery asked him his meaning. Lt. Wallace stated that Dr. Callery was so focused on his private consulting work that he "pushed out" State work. Investigators found evidence of weeks when Dr. Callery did not work the required 37.5 hours due to his travel and other activities. Dr. Callery was responsible for certain "system failings". SX 1 at 110.

In his report Lt. Wallace referred to Dr. Callery as "surreptitious" in "blurring lines" between his State and his private work. *Id.* Lt. Wallace admitted that Dr. Callery had not performed autopsies "surreptitiously". The word refers to the "totality" of his work. Private and State work was so intermingled that it was not easy to see distinctions. Dr. Callery was obligated to perform State work on State time. Dr. Callery was reminded that, when he testified, he was free to describe the flexible nature of his schedule.

In his report Lt. Wallace also referenced the fact that Dr. Callery would explain his schedule by referring to "non-existent agreements" authorizing him to do as he did. Lt. Wallace testified that Dr. Callery stated that certain cabinet secretaries had authorized his private activities. However, those secretaries said that Dr. Callery was to perform his private work on his own time. Dr. Callery has not produced any written agreements which allowed him to perform private autopsies at the OCME. No one else has identified any agreement permitting the activity.

Lt. Wallace continued. Dr. Callery created a culture wherein others were not permitted to question Dr. Callery regarding his activities. Dr. Callery did not take responsibility for his

own behavior on the issue of private vs. public business. Investigators tried to recreate Dr. Callery's schedule from several sources. Lt. Wallace can not confirm whether "15-20 hours per week on private business" was an accurate estimate. Investigators could not establish average private work time per week. Interviews confirmed that Dr. Callery was "consumed" with his private work and was not tending to State work. It was determined or estimated that the amount of "stolen" time and personal use of State resources approximated $100,000 in value.

After Dr. Callery had completed his cross-examination, Ms. Plerhoples asked additional questions. A supplemental report by Officer Chappo summarized some OCME interviews. Lt. Wallace reiterated that he had reviewed the reports to prepare for his testimony.

Dr. Perlman, an Assistant ME, stated that Secretary Nazario had verbally agreed that Dr. Callery could perform paying autopsies in the "decomp room" for a fee of $200-250 for the room usage. Investigators found that Dr. Callery had not made such payments to the State for the use of the room.

Dr. Callery again asked Lt. Wallace why he determined that this case was "one of the worst" lab scandals in the U.S. He stated that after findings were made, the State was required to send drug evidence to a private lab. Evidence had to be re-tested. Some criminal cases were dismissed. The case impacted others which were both pending and already adjudicated. The case had an impact on some incarcerated individuals. Dr. Callery's use of "comp time" and his schedule factored into these conclusions.

During the investigation it was determined that other evidence showed tampering. SX 1 at 13. Some bags of pills had been ripped open in overdose death cases. Four OCME employees were identified as possible evidence thieves. After consulting with investigators, the DOJ determined to file no charges against them. [redacted] were arrested but

were not convicted of theft from the OCME. [redacted] personnel file contained evidence of falsifying lab work. No background investigation was performed on [redacted] It is possible he engaged in misconduct while a New Castle City police officer.

Dr. Callery objected to questions from the State on crime lab problems in that Lt. Wallace does not have expertise in the area. Ms. Plerhoples clarified that she was only asking about what Lt. Wallace observed in the lab, and not questions about technical points. The objection was overruled.

Dr. Callery then asked Lt. Wallace what he had observed in the crime lab. He said the following were observed: internal security issues, glitches in the key fob access to doors, security camera video could not be viewed, the vault door was propped open, the internal tracking system showed that 8,500 exhibits were present while the total was actually 9,200. Finally, records concerning access to codes for the exterior door were spotty. Employees did not anticipate a Y2K computer "glitch".

Dr. Callery conducted further cross-examination. Lt. Wallace testified that then-Secretary Nazario had acknowledged the verbal agreement concerning private autopsies in the OCME. During the period 1994-2014, no physician had made the $200-250 payments for private use of the autopsy room. Police failed to develop other suspects in a drug theft investigation.

Dr. Callery asked Lt. Wallace what where the procedures used when drugs were found near a dead person. He explained that the drugs were brought in by police. Some were in torn bags. Some containers had missing pills. However, no theft suspects were developed.

With regard to the propped door, that was done to ease entry and exit. Lt. Wallace testified that the door was propped open behind another, locked door. Individuals must be "buzzed in" and must sign in.

Lt. Wallace did not know why there were 700 more exhibits in the vault than records showed. The number is significant because it is not known who retained the evidence, and on what authority. There was no documentation answering the questions. Some evidence had been removed for testing. Some excess drug evidence was used in law enforcement training.

At the beginning of the second day of the hearing, the State called Dr. Callery, who had been sworn earlier in the proceedings. Ms. Plerhoples drew Dr.Callery's attention to certain Superior Court records pertaining to Dr. Callery's related criminal case. SX 1 at 82 *et seq.* His "Plea Agreement" is found at SX 1 at 82. Dr. Callery acknowledged signing the agreement. In it he entered a plea of *nolo contendere* ("no contest") on two charges of Official Misconduct. He was sentenced to probation, restitution to the State in the amount of $100,000, and 500 hours of community service. Dr. Callery testified that he has paid the restitution order in full and has performed the requisite community service.

Dr. Callery testified further that his community service has consisted of 250 hours of lectures to professional organizations and groups in Ohio, Oregon, Massachusetts, Pennsylvania and Maine. He has volunteered at the Food Bank for 250 hours. He has acted as a trail monitor at Carpenter State Park. He has also volunteered to walk dogs at the SPCA and to volunteer as a physician at Delaware Hospice.

At present his medical license is active. His Controlled Substance Registration is no longer active. Nor will he renew it. Only Schedule 1 drugs are used at the OCME. His medical specialty is Pathology, with a sub-specialty in Forensic Pathology. Since 2015 he has provided

medical education such as at the New York Coroners' Association. He will continue to lecture. He does not plan to conduct further autopsies. Nor does he presently plan to supervise other medical professionals. He added that his ability to serve as an expert witness in certain cases has been "negated" by these proceedings.

Dr. Callery was appointed CME and Director of the Forensic Sciences Lab in April 1994. Hal Brown was the Deputy Director. Brown is not a physician, but a former police officer. Brown oversaw the Controlled Substance Unit. The Evidence Unit received and tested seized drug evidence. The Controlled Substance Unit did not test all drugs. For instance, evidence wa not tested if a criminal case were dismissed, or if a guilty plea were secured.

Some drugs were retained in the Controlled Substance Unit. Some were used for "decades" for training and teaching purposes. Evidence that old was typically not entered in the "FLIMS" system. A logbook preceded the use of computerized tracking. Dr. Callery stated that he was involved in the adoption of policies and procedures in CSU. He was also involved in hiring for the OCME. He rehired Mr. Daneshgar.

Dr. Callery was generally aware of problems with OCME key fobs. He knew that the technology had to be replaced. He addressed the issue through his supervisor. He was also aware that security cameras did not record indefinitely. Exposed video was overridden after one week. Dr. Callery thought that reasonable.

Dr. Callery is also aware that some drugs were missing. He referenced Lt. Wallace's description of torn bags and spills. He is aware that some of the "product" brought to the OCME had broken bags and spills. He noted that in the death investigation cases described by Lt. Wallace, none of the DSP cases in the list of 46 cases sustained evidence losses. He added that some of the drugs lost as reported may not have been controlled substances.

Ms. Plerhoples asked Dr. Callery if, at any time prior to his suspension in February 2014, he was told by supervisors that his private consulting work was a problem. Dr. Callery testified that he was told in 2013 to cease his private work in State offices. Dr. Perlman has explained that he was permitted to do the work before that time. He stated that he was not charged fees for the use of the OCME premises. Secretary Nazario had told him to "keep it under control".

Dr. Callery stated further that Dr. Perlman had written protocols for the private work which they both then revised. The protocols were then submitted to Secretary Nazario. There was no written agreement with Secretary Meconi regarding private use of the State facilities. Dr. Callery therefore assumed that the permission from Secretary Nazario was "binding" on successors. Dr. Callery was not a State merit employee while CME.

Ms. Plerhoples asked Dr. Callery if he had submitted any documentation to the Public Integrity Commission (PIC) regarding his private work. Dr. Callery responded that he did not have the documentation. Prior to the OMB investigation, Aaron Goldstein had asked for it. Dr. Callery added that he never received a written opinion from the PIC. Mr. Goldstein may have seen his submission, or a PIC opinion. At this point the State rested its case.

Dr. Callery began his case by continuing his own sworn testimony. He has held a Delaware medical license since 1989. He is licensed in Rhode Island as well. He was hired by Dr. Ali Hameli as an Assistant Medical Examiner in 1989 and served in that capacity until 1992. During that period he earned "comp time" when he was not required to work. He also worked on weekends with Dr. Inguito. He was off work on Tuesday and Thursday afternoons. None of the medical examiners in the office were required to "punch in" when reporting for duty. During this period Dr. Judith Tobin had been an Assistant ME for 40 years. She maintained her own hours as a hospital pathologist.

On his days off during these early years, Dr. Callery worked as a surgical pathologist at St. Francis Hospital in Wilmington. He held both the hospital and State job until 1992. At that point he became a full-time pathologist at St. Francis. His family was growing and the salary was greater. From 1992-1994 Dr. Callery returned to State duty as an Assistant ME. As an Assistant ME he worked in histology on weekends.

While a full-time employee of St. Francis, he was contacted by Secretary Nazario. She informed him that Dr. Hameli had been terminated. She asked Dr. Callery to accept the position of CME on an interim basis. Dr. Nazario then spoke with the President of St. Francis, who approved the arrangement whereby Dr. Callery would become Acting CME. Dr. Callery therefore assumed that position while retaining employment at St. Francis. He was Acting CME from 1994-1997.

When Dr. Callery started as Acting CME, he was issued an assigned State vehicle. Dr. Nazario approved his use of the vehicle to commute between St. Francis and the OCME. Dr. Callery estimated that he used the car about 20% of the time. Eventually Dr. Nazario offered Dr. Callery the position of permanent CME in 1997. Around this time he was also performing private autopsies and working on asbestosis cases in Rhode Island.

From 1997-2007 Dr. Callery received good job evaluations. He was eventually reappointed to the position of CME and Director of the Forensic Sciences Lab. That lab received accreditation. Dr. Hameli approved of Dr. Callery performing private autopsies while serving as CME. Dr. Callery arranged to pay a histologist and to pay for slides in conjunction with that private work. At this point Dr. Callery produced a sample of a slide for examination during the hearing. The histologist would prepare slides which Dr. Callery had supplied and paid for. Any

expense to the State stemming from the private work was "trivial", according to Dr. Callery. For instance, State-supplied stain may have been used on the slides.

The conference room in the OCME was next to Dr. Callery's office. The OCME covered the entire State. Dr. Callery occasionally gave private depositions in the OCME as needed. From 2008-2014, a total of 30 depositions were taken there.

Dr. Callery was reappointed as CME in 2007. He was aware at the time of "significant problems" in the drug unit. Of the 9,200 exhibits removed from the OCME vault and taken to Troop 2, Lt. Wallace informed him that none had been tampered with. Dr. Callery told Lt. Wallace that damaged drug evidence would be returned by OCME to police agencies, but that officers would refuse to take the evidence back.

Dr. Callery stated that he was a dedicated CME. No complaints were made concerning his competence. He has never been accused of medical malpractice. His professional society, the American College of Forensic Pathologists, has not sanctioned him.

In this case Dr. Callery testified that there is no "compelling" evidence that anyone stole anything from the OCME on his watch due to a lack of supervision. His Deputy Assistants were all "solid people". They understood rules governing the handling of evidence. The OCME was accredited for handling drug evidence. As an exempt employee, Dr. Callery stated that he had "leeway" in arranging his schedule. He did not "steal" State time.

This case has impacted his family. His son has chosen not to practice law in Delaware or to be otherwise employed in Delaware. His house was damaged during a search. A police officer drew a weapon on his son. He has received death threats. He traveled to Cleveland to be safe. He has incurred much expense. He was informed by a private attorney that he would be

charged a substantial sum for his defense in the related criminal matter. As a result, he agreed to the plea and the court-ordered restitution amount of $100,000.

Ms. Plerhoples then cross-examined Dr. Callery. Dr. Callery does not believe that all in the Controlled Substance Unit was as it should be. Supervision was not present at all times. Equipment was not up to date. He added that policies were in place, and that the ISO had approved the functioning of the lab. Dr. Callery stated that he did not have the support of the cabinet Secretary. His supervisor, Henry Smith, "did not care". He did not support Dr. Callery, and did not complete performance reviews. (One anecdotal reference in the investigation reports stated that Mr.Smith did not want to visit the OCME because he did not want to be around dead bodies.)

Dr. Callery testified that there is no evidence that any thieves got into the OCME. Dr. Callery knows of none. [redacted] was charged with possession of marijuana in his home, not theft. Mr. [redacted] was not convicted of trafficking cocaine, and he was not jailed. To prove a crime "beyond a reasonable doubt" is a high evidentiary standard. Mr. [redacted] was a "good cop", and did his job well. This case has destroyed [redacted] career. He has been convicted and can no longer be employed as a police officer. He became unemployable, and has since died.

In response to the hearing officer, Dr. Callery testified that the CSU supervisor became ill and used all allotted leave. The State did not allow the hiring of a replacement as that would create a prohibited "dual incumbency". Hence, the CSU was without supervision for a time. He added that Hal Brown had experience in supervising police officers. Dr. Callery "knew what was going on". He will not criticize those individuals whom he hired. He named several persons who remain employed in the OCME.

Dr. Callery stated that before he was suspended as CME, he had hired Robert Quinn. Quinn did well until hired for a position in a North Dakota lab. Dr. Callery reiterated that a female supervisor under him became ill. Hence, supervision was reduced. The OCME did the "best we could" with available personnel and a lack of updated equipment and technology.

At the beginning of the third day of the hearing, Dr. Callery made reference to certain documents relating to the Public Integrity Commission contained in RX 8. Ms. Plerhoples stated that she would have questions regarding that exhibit later in the hearing.

Dr. Callery then called Emerich Pretzler. In 1964 he served as a morgue assistant. He served as Chief Investigator in the OCME from 1975-2008. In that capacity he supervised other investigators. He reported to death scenes where he noted facts and took photos. He would go to some scenes with Dr. Callery. He also worked with Dr. Hameli.

Mr. Pretzler testified that Dr. Hameli was an "unusual" and "strict" CME. Under Dr. Hameli, it was "his way or no way". He was "strictly business" and the "final authority". Some private autopsies were performed at the OCME during his time as Chief Investigator. Julie Person was a histologist at the time. Mr. Pretzler assumed she was being paid privately for private work.

Dr. Callery's office at OCME contained no files. It had a book case. Files were kept in a file room. A conference room was used by Drs. Hameli and Callery,. They would meet in that room with private attorneys. The physicians preferred to perform private work in the OCME so that they were available to be called out on State cases.

Mr. Pretzler would report unethical activities to Dr. Hameli. He would also report illegal acts to both Dr. Hameli and Dr. Callery. With regard to Dr. Callery, he did not report any illegal

or improper acts. Dr. Callery received "comp time" for his State work at night and on weekends.

Dr. Callery set up a Sussex County office of the OCME which was dedicated to Dr. Judith Tobin, former Assistant ME. Dr. Callery spoke at the dedication. Dr. Tobin was also a hospital pathologist. Dr. Hameli approved the arrangement. Dr. Tobin has done an excellent job in her position, and specially in working on AIDS cases. Ms. Plerhoples asked for a showing of relevance. Dr. Callery stated that he wanted to show that others worked two jobs but were not accused of poor supervision. Dr. Callery stated it was his practice to work on weekends and holidays even if not on call. He would respond to cases at night. He argued that he was not "stealing" State time. Dr. Hameli was aware of Dr. Callery's position at St. Francis and his use of a State vehicle. Dr. Hameli's State car was taken back when he was fired.

Mr. Pretzler continued. Dr. Callery's management "style" was not "surreptitious" when he read, wrote and was on the phone. He was not "lazy" or "self-absorbed". He worked more hours than he was paid for. He was not "rarely" present at OCME. Employees liked him. He was a good worker and did not "cheat" the State.

Dr. Callery is competent in Forensic Pathology. Mr. Pretzler worked with him as he prepared lectures. Dr. Callery educated the staff, and kept materials for them. Though Dr. Hameli would fight with contractors, Dr. Callery worked with them and a new building was constructed. He instructed on DNA subjects, and started DNA and arson labs at OCME.

Irene Hopper was Dr. Callery's secretary. She was competent. Dr. Callery had good relationships with investigators. He did not ignore problems which arose. In Mr. Pretzler's opinion, Dr. Callery was "first rate".

Ms. Plerhoples cross-examined. Mr. Pretzler was not familiar with the operation of the OCME from 2009-2014. He was not involved in the OMB investigation, nor its findings. Nor is he aware of the results of the DSP investigation in this case. Mr. Pretzler did not "monitor" Dr. Callery's time at the OCME. Dr. Callery had a State car assigned to him, but used his personal vehicle to travel out of state.

After an objection was overruled, Mr. Pretzler stated that investigators were prohibited from taking second jobs. He does not know if Dr. Tobin performed her hospital job on State time. She remained on call. He only knows of Dr. Callery's convictions from media reports.

On re-direct examination by Dr. Callery, Mr. Pretzler stated that dead bodies were picked up in a State Suburban vehicle. Dr. Callery's vehicle (a Tahoe) had regular license plates and the seal was removed. He "had to travel with his family". Dr. Tobin performed State work on hospital time. Physicians in the OCME performed work when necessary and at night without overtime pay.

Ms. Plerhoples made another objection to "relitigating" Dr. Callery's criminal case. She argued that he should be estopped from doing so. Dr. Callery stated that he had performed research on the legal term "estoppel". He researched the term "entrapment by estoppel" with regard to performing acts which had been approved or deemed "legal". Ms. Plerhoples argued that the point should have been made in the criminal case, in which Dr. Callery was represented by counsel. She argued further that Dr. Callery had not been informed that his behavior was acceptable. He entered a "no contest" plea to a charge that he had performed private work on State time.

Ms. Plerhoples continued. Dr. Callery should not be permitted to relitigate matters in the criminal case in the context of this hearing, though he may provide evidence in mitigation. Dr.

Callery confirmed that he knows that the conviction stands. This hearing officer instructed Dr. Callery that evidence which should have been raised in the criminal case may not be introduced here in an effort to minimize or discount the conviction.

Dr. Callery then called Dr. Susan Donnelly. She met Dr. Callery in 1990 when she was a pathologist at St. Francis. She received her medical degree in 1985. She started at St. Francis in July 1990. She received forensic pathology training there from Dr. George Katzis. She passed the Board examination in pathology in 1990 or 1991. Her subspecialty is in Cytopathology.

Dr. Callery was initially a part-time St. Francis employee. He then moved to full-time. Dr. Callery was competent, productive and easy to work with. He was Board-certified in Forensic Pathology. Physicians at St. Francis did not "punch in", but had scheduling leeway. From 1994-1997 Dr. Callery held the two jobs. That was a challenge. He was not derelict in his hospital work. Dr. Callery was helpful and not "surreptitious" or "self-absorbed". He was competent and ethical. He had integrity and helped her in cases. They had a good relationship. In response to Ms. Plerhoples, Dr. Donnelly stated that she worked with Dr. Callery from 1992-1995.

Dr. Callery next called Gary Hartung. He has known Dr. Callery for 15-20 years. Mr. Hartung was a diener (autopsy assistant) in Chester County PA. The two were friends. Mr. Hartung also worked at the OCME. He would set up bodies on a table and prep them for autopsies. Mr. Hartung had his own equipment and used it with Dr. Callery. When he would assist Dr. Callery, he would receive a check from Dr. Callery for $100-150 per autopsy. At OCME he was buzzed in and logged in and out.

Mr. Hartung testified that before autopsies were conducted, the identity of the body was verified. He was paid for his time, from arrival to departure. Dr. Callery was not slow or

incompetent. Mr. Hartung trusted Dr. Callery's diagnoses. Dr. Callery was not unethical. His reputation in Pennsylvania was "solid".

In response to Ms. Plerhoples, Mr. Hartung stated that he did perform some work with Dr. Callery during the period 2009-2014. He assisted on "very few" autopsies at OCME during regular business hours. Mr. Hartung was not involved in the DSP investigation in this case other than to give one interview. He was not involved in the OMB investigation, and does not know the facts found in that investigation.

Dr. Callery then called Anne Marie Banack. She was the St. Francis pathology secretary for 41 years. While employed there neither she nor others observed problems with Dr. Callery's behavior. She has typed his consultations, invoices and autopsy reports. She was paid by Dr. Callery by check for his private work. After Dr. Callery became CME in 1994, he continued at St. Francis. His hours were "flexible". She is aware of his activities in a St. Francis lab.

Dr. Callery was productive, competent, and had a good reputation at St. Francis. No medical malpractice cases were filed against him. While he was CME, Dr. Callery worked on significant cases in various disciplines. Studies were done in groups of slides. She typed his private autopsy reports since the 1990's. She did billing for Dr. Callery. This was all done on her own time.

Dr. Callery was not "surreptitious" or "sneaky". He was ethical, competent, honest, and a hard worker. He was well regarded and got along with others. He was trusted and not "self-absorbed".

Ms. Plerhoples cross-examined. Ms. Banack gave a statement to the DSP during its investigation in this case. From 1994-2014 Ms. Banack was a "casual seasonal" employee of the OCME. She performed similar work for Dr. Callery at the OCME as that done for him at St.

Francis. She typed his correspondence and invoices in conjunction with his private work. She used an OCME computer. She was not involved in the OMB investigation.

On re-direct examination by Dr. Callery, Ms. Banack testified that reports were loaded on State floppy discs. The State paid her by the case for State work. She was not on State time while performing private work for Dr. Callery.

Dr. Callery next called Gerard Spadaccini, Esq., a member of the Delaware Bar. He met Dr. Callery at the Delaware Medical Eye Bank, where corneas were recovered from decedents for transplantation. He finished law school in 1999, and then earned a masters degree in Forensic Science. Dr. Callery hired him as a Deputy Principal Assistant at OCME and he worked there from 1999-2004. Dr. Callery was given an award for his activities in transplantation.

As Deputy Principal Assistant, Mr. Spadaccini supervised the Serology Lab, which is connected to the DNA Lab. He was employed in OCME when those labs were established, as well as the Fire Debris Department. Mr. Spadaccini helped establish those units and the creation of testing sections.

There were "always" problems at OCME. There was a lack of State funding. He is aware that Dr. Callery performed private autopsies at OCME. He occasionally used the OCME conference room for private work. Mr. Spadaccini's office was about 12 feet from Dr. Callery's. He observed Dr. Callery at work. His phone calls and writing were not "surreptitious". It was a "positive" experience working at OCME. Dr. Callery was competent and well-regarded by his peers and others.

Ms. Plerhoples cross-examined. Mr. Spadaccini worked at the OCME from 1999-2004. He did not monitor Dr. Callery's time, nor "comp time". They did discuss comp time because

autopsies and investigations on weekends. Mr. Spadaccini took "flex time" if he was on call. He did not submit his hours. A secretary kept his hours.

Mr. Spadaccini is now a Public Defender. He is aware of problems that arose in the Drug Lab after he left OCME. The problems impacted the Delaware criminal justice system. It also prompted appeals by the Public Defender's Office. The impacts included the investment of time on the issues, attention and opening eyes on forensic science, and other issues.

On re-direct examination by Dr. Callery, Mr. Spadaccini stated that he could not see the evidence intake location from his office. He is aware of tampering problems at OCME. The evidence vault could be secured better. He is aware that cases in the vault were inventoried. The integrity of evidence is important. If there were no evidence of tampering with any evidence, management was good.

Mr. Spadaccini is unaware of the number of exhibits tampered with. He does not recall if it was determined where tampering occurred. He did not recall two cases mentioned by Dr. Callery. Mr. Spadaccini was in court on one day when the "issue played out". He is unaware if any evidence was tampered with while housed at OCME.

Mr. Spadaccini and Dr. Callery were exempt State employees. His time at OCME was flexible. Mr. Spadaccini had regular work hours. Dr. Callery had on-call hours on weekends. Dr. Callery's hours were not regular. "Regular" hours were between 8 a.m. and 5 p.m. Exempt employees did not have "regular" hours. Dr. Callery expected him to work as necessary, and not "regular" hours. Mr. Spadaccini could not name a case in which tampering in the OCME affected its outcome. He agreed that a lack of funds and personnel can affect security.

Dr. Callery next called Brian J. McCarthy. He worked with Dr. Callery at OCME from 1994-2014. His duties included investigating the circumstances and manners of deaths. Mr.

McCarthy was in law enforcement in the U.S. Air Force. He was also an EMT and worked for the Secret Service. He worked with the DEA. and has a strong investigative background. At one point he provided security for President Reagan, and provided protection for Vice President Bush for two years.

Mr. McCarthy worked with Dr. Tobin. She did her public and private jobs well. He was asked about "seeking the hiring packet for Ms. Monahan". Mr. Spadaccini spoke with Mary Parker of HR about that. McCarthy did not speak with Dr. Callery on the subject. Dr. Callery was loyal to other employees.

Mr. Spadaccini did not report Dr. Callery's private work to anyone. It was not unusual. Dr. Callery maintained that practice because of his expertise in death cases. Dr. Callery was "culturally accepted" at OCME. His collcagues also did private consulting. Between 2009 and 2014, there were fewer than 100 chief medical examiners in the U.S. The specialty is uncommon. Some of those officials do not have Board certification. Dr. Callery was the only physician in Delaware certified in Forensic Pathology.

Dr. Callery lectures other physicians, who are awarded continuing medical education hours for attending. He continues to do that, and is positively received. Mr. Spadacinni is confident in Dr. Callery's judgment. He has a good reputation. He did not mistreat employees. He is not "sneaky or surreptitious". Nor is he "self-absorbed" or unethical. He is confident in his work and in life. He is "extremely revered" outside Delaware for his "fantastic contributions."

Dr. Callery asked Mr. Spadaccini his opinion of the investigation in this case. Ms. Plerhoples objected. Dr. Callery was asked to "lay a foundation" for the question, i.e. the witness' knowledge of the investigation. Mr. Spadaccini is "generally" aware of the

investigation and removal of evidence from OCME. He is not aware that no evidence in the OCME vault was tampered with. Ms. Plerhoples objected again, this time with regard to Dr. Callery's characterization of the record in this case in asking his questions.

Again, Dr. Callery was asked to explore the witness' knowledge of the investigation. Mr. Spadaccini stated that he is aware that Mr. Daneshgar was not convicted of evidence tampering. He knows that Mr. Woodson is a "good man" and an asset to OCME. Mr. Spadaccini testified that he is not aware whether Mr. Woodson was convicted of stealing drugs at OCME.

Mr. Spadaccini observed that "good managers have good people". Dr. Callery hired a number of good people. Ms. Plerhoples objected on the basis of relevance. Dr. Callery explained that he had been accused of being inept. Ms. Plerhoples argued that Mr. Spadacini's opinion of other employees is not relevant. Dr. Callery stated that he had been accused of a lack of supervision. That may imply faults in the OCME hiring process. The objection was sustained.

Mr. Spadaccini knows Hal Brown and his oversight duties. He was hired by Dr. Callery as Deputy Director. Brown is a good person and is extremely competent.

Ms. Plerhoples examined Mr. Spadaccini. He has a high opinion of Mr. Brown, who has a good relationship with Dr. Callery. There are no "ill wishes" between them, though there was occasional frustration. Investigations were affecting the office. Mr. Spadaccini saw their negative impact. Mr. Brown bore no personal animus toward Dr. Callery. The "frustration" lay in the fact that Mr. Brown believed that the State is intent on "destroying" Dr. Callery through media coverage. Mr. Brown was frustrated and tried to get Dr. Callery to "bring in the troops". That was prompted by the OMB investigation. Mr. Spadaccini told DSP investigators that Dr. Callery was a good physician but "not the best" administrator. It was good that Dr. Callery hired

others to do work he was not trained to do. In response to Dr. Callery, Mr. Spadaccini testified that Mr. Brown and Dr. Callery are now friends.

Dr. Callery next called John Merino, who testified without objection by telephone. He was a Deputy Director at OCME and worked there for six years. He had earlier served as a Forensic Evidence Specialist for Delaware police agencies. He retired as a Detective after 13 years with the New York Police Department.

As Deputy Director he had lab oversight. He traveled statewide to collect evidence, bring it to OCME, and log it in. He also verified when evidence was logged into the OCME system and secured in the safe or vault.

With respect to chain of evidence custody, if Mr. Merino received evidence in an envelope which showed evidence of tampering, he would not accept it. Nor do police officers picking up the same sort of evidence. Many officers are trained to detect evidence tampering. A police officer should not accept a bale of marijuana from which a corner had been cut off. Before evidence is released to police officers, an effort should be made to ensure that it is sealed. If the evidence has been tampered with after a police officer receives it, its integrity should be noted. Neither police officers nor OCME would accept evidence which has been tampered with.

Dr. Callery was Mr. Merino's direct supervisor. Dr. Callery was not "detached", but was very engaged in OCME operations. Nothing reflected negatively on Dr. Callery. He was not "surreptitious" or a "sneak". Mr. Merino was honored to work with him. Dr. Callery was attentive to challenges concerning employees, issues with other agencies, and the like.

Mr. Merino was asked what challenges presented to OCME. Mr. Merino testified about a "high case load". There were problems in retaining lab personnel. Dr. Callery allowed him to implement salary increases and a career "step ladder".

Mr. Merino stated that Dr. Callery was in his OCME office "every day". He would also work on weekends. He is not self-absorbed. He was concerned about the office and staff. He helped others keep pace with the work flow. He was attentive to details and the needs of the office.

Ms. Plerhoples cross-examined. Mr. Merino worked at OCME from 1999-2006. He was a Forensic Specialist in the Controlled Substance Unit. He then became a Deputy under Dr. Callery. He oversaw lab work.

Mr. Merino denied that the vault door had ever been propped open. Only Mr. Merino and another specialist had access. Even chemists were denied access. Mr. Merino does not know how data for the key fob access system was maintained. Mr. Merino had access to that data, and testified that it was sccurate.

Mr. Merino never saw loose drugs on the vault floor. Evidence was not placed on a stairway. Stairways were secured. A key fob was required to access the building. Mr. Merino was not aware that certain drugs were used for training. Mr. Merino summarized the chain of custody procedure used at OCME.

Dr. Callery questioned the witness further. Though the door to the intake area was open while employees were present, the vault remained locked. Even if both doors were propped open, the building remained secure. There were HVAC problems in the building related to moisture and leaking roofs. Propping a door open was permitted for ventilation, though the vault remained closed. Hal Brown was competent. Mr. Merino knew him as a police officer. Brown was aware of chain of custody procedures. Marijuana plants were not dried in a cabinet on the stairs. It was acceptable to dry plants in secure areas.

Checking access data was permitted by the Deputy Director or the unit supervisor. Mr. Merino did not train chemists or assign samples to them. Carolyn Hans had permission to store evidence in the vault. If she were storing evidence used in proficiency training, she should have documented that fact.

Dr. Callery then called Dr. Adrienne Sekula-Perlman. She earned her medical degree in Pennsylvania. She trained as a medical examiner at the Pennsylvania Hospital of the University of Pennsylvania. Dr. Callery hired her as an Assistant Medical Examiner in 1994. In 1996 she was appointed Deputy Chief Medical Examiner. She knew Dr. Callery well.

With regard private autopsies, permission was granted to perform them at OCME. It was left to Dr. Callery to negotiate the terms of such private work with Secretary Nazario. If she performed private autopsies at OCME, she would reimburse the State for expenses.

Dr. Perlman testified that it was a sad day when Dr. Callery left the OCME. Five pathologists were employed there at the time. Dr. Callery was always there for OCME employees. Many regretted his departure. She stated that what happened to Dr. Callery was not his fault, but the fault of Hal Brown. Dr. Perlman testified that all medical examiners in the U.S. perform private autopsies.

Dr. Perlman was not an "hourly" employee. She and Dr. Callery were on call "24/7". They worked late at night. One was expected to be available.

On cross-examination by the State, Dr. Perlman confirmed that she had spoken with the DSP in 2014. She did not state that private autopsies were only performed when physicians were off duty. There is no "on duty" status. In response to the hearing officer, Dr. Perlman stated that private autopsies were permitted at OCME whenever the room was available.

At the start of the final day of the hearing, Dr. Callery called Hal Brown. Prior to his employment at the OCME, Mr. Brown was a New Hampshire police officer from 1975-2005. He worked there on patrol and major crimes, and was commander of the Uniformed Division. He then worked in the New Hampshire Medical Examiner's office. He underwent two years' training and worked with a county medical examiner. He taught courses at the University of New Hampshire. He was employed in the Delaware OCME from 2005-2014. Thereafter he remained "on the books".

In New Hampshire he became experienced in chain of custody issues. Ms. Plerhoples objected to testimony on this background information on the basis of relevance. Dr. Callery stated that he was establishing Mr. Brown's credentials. The objection was overruled. The New Hampshire CME asked Mr. Brown to review the state's evidence system and make recommendations for improvement. Mr. Brown found concerns regarding automation, proper storage, security and inventory. Mr. Brown has seized drug evidence at death scenes to assist in determining the cause and manner of death.

With regard to drug storage in Delaware, Mr. Brown was concerned with security. He secured a bank of lockers to secure evidence in the morgue. Only the Forensic Evidence Specialists had access to them. He had video cameras installed in the Toxicology Lab. Dr. Perlman, however, had the taping halted. Employees returned to manual counting. From 2009-2014, the Toxicology Lab gave evidence to the Forensic Evidence Specialist. That specialist would then secure the evidence in the vault.

Mr. Brown was "not always" confident in his subordinates. There were "tremendous" hiring challenges. Background checks were performed, and applicants were polygraphed. The background checks were restricted. Polygraphy stopped. Mr. Brown proposed random drug

testing of employees because of job access to drugs. The Department of Health and Human Services would only permit the testing if it were done agency-wide. Hence, the testing was not funded. OCME was operating at a $100,000 per year budget deficit. Because OCME was underfunded, new equipment could not be purchased. A policy was adopted requiring that OCME chemists have college degrees.

Drugs seized in the field included prescription and over-the-counter medications. Mr. Brown testified that he was competent to oversee the evidence unit.

Dr. Callery questioned Mr. Brown regarding evidence bags which had been ripped or otherwise damaged. Mr. Brown testified that he "never once" observed such conditions. It is incorrect to state that evidence bags were ripped or otherwise tampered with in evidence lockers.

Dr. Callery offered a new exhibit containing 95 pages which is a response to the DOJ report. The State objected to pp. 55-57 in the document which contained references to media stories regarding theft of drugs in the U.S. by police officers. She argued that those pages were misleading and not relevant. Dr. Callery argued that the articles were inserted because the police report in this case had characterized this case as "one of the greatest scandals" in the country. The exhibit was admitted as RX 9 with the objectionable pages removed.

The following additional exhibits offered by Dr. Callery were also admitted: A one-page handwritten document captioned "Summary of Missing Drugs" (RX 10); a one-page handwritten document captioned "Summary Missing Drug Cases" (RX 11); a two-page typed document captioned "Is There Really a Drug Theft from OCME?" (RX 12).

Dr. Callery questioned Mr. Brown about RX 9. RX 9 at 1 is an organizational chart of the OCME. It shows certain employees who do not report directly to the CME. Mr. Brown

testified that it was not possible for Dr. Callery to directly supervise some employees from his office. Employees were permitted to approach Dr. Callery for guidance.

RX 9 at 2 discusses problems in updating the lab area. They included frustration with the lack of funds and staff. Instruments would break down. Mr. Brown testified that he considered resigning because due to a lack of support "from the Secretary", OMB, and the Governor. More evidence was coming in as staff was being reduced. Secretary Landgraf could do little to help. Deputy Secretary Henry Smith "seemed disinterested". He was often invited to OCME, but never came. He was "removed" and "unsympathetic".

Mr. Brown testified that OCME and the Forensic Science Lab were a part of a large State department which dealt primarily with "people in need". The Department told OCME that ther was "no money for your problems". OCME was directed to cut its budget. Mr. Brown added that OCME often had to deal with bereaved families.

Some solutions were tried. Police chiefs agreed to provide money from seized drug money to replace an old spectrometer. Mr. Brown arranged for a new evidence tracking system similar to EZPass and developed in Virginia to be tested in Delaware. The system was eventually not implemented here because there were no funds to maintain it. This was one of the most frustrating occurrences in Mr. Brown's career. He sustained a mild heart attack in 2014 and resigned. All lab managers were also frustrated. Dr. Callery was a strong proponent of applying for grant funds.

The drug lab was assigned the greatest work load and had one lab manager. Other labs had 2-3 managers. Some of them resigned because the work was overwhelming. One manager became ill but a replacement could not be hired. In 2014 a second manager was authorized for the drug lab.

Reference at RX 9 at 8 is made to Areatha Bailey, a casual seasonal employee. The State objected to questioning Mr. Brown about her on the basis that he would be speculating and the information was taken from the DOJ report. The objection was overruled. Mr. Brown stated that there are factual inaccuracies at RX 9 at 8. The Forensic Evidence Unit was in "dire straits" with a specialist out for surgery. Mr. Brown raised the issue but the Secretary was "no help". Ms. Bailey was offered and given a good recommendation. She was hired as an OCME receptionist. However, she was needed in the Forensic Lab for basic clerical work and logging in evidence. Therefore the DOJ report was inaccurate because Ms. Bailey was hired.

James Woodson is discussed at RX 9 at 12-29. Mr. Brown knew he was a former university and New Castle City officer. He also had undergone medical lab training. He was hired at OCME following Department HR procedures. No special skills were required for his position. Woodson wanted to rise in the OCME structure. He was a "good fit". Mr. Brown added that while Woodson was employed in the City of New Castle, an individual alleged that he had stolen money. Woodson denied the claim. A polygraph exam was inconclusive. Woodson resigned and applied for the OCME position. He was hired. The New Castle Chief would not reopen the investigation.

Evening work at the OCME is discussed in the DOJ report. RX 9 at 34. Key fobs were used to gain building access and to get into different rooms. Labs were closed on weekends. Though overtime was not paid, some lab workers stayed on to process evidence. Forensic investigators worked "24/7". They could deactivate building alarms working "after hours". That did not mean that the public could access the building. With regard to an alarm in the morgue, Dr. Callery had to deactivate a door to get to his office. The integrity of evidence was not threatened.

Since the OCME office is a "24/7" operation, some slept in the office. Some employees had to be available to respond to emergencies. An employee required to work 2-3 straight shifts had to be able to sleep. Mr. Brown was concerned with the problem of sleep deprivation and falling asleep while operating a vehicle. Sleeping at work does not put drug evidence at risk. Mr. Brown went to Dover to get two new investigative positions, one in the north office and one in the south. In order to analyze evidence "after hours", an employee was to get permission. The problem with such work is that it was unpaid.

Individuals in forensic evidence positions were required to do courier work picking up and delivering evidence. Couriers were unsworn and unarmed. This was a "disaster waiting to happen", according to Mr. Brown. The Secretary would not provide help.

At this point in the examination, Ms. Plerhoples asked what relevance in this case were the actions of Mr. Brown. Dr. Callery wanted to show that Mr. Brown was a meticulous person under his supervision. Before ruling on the objection, I asked Dr. Callery to inquire as to what, if any, of Mr. Brown's actions were directed by him. Mr. Brown then testified that Dr. Callery was aware of all of his actions as his supervisor. Mr. Brown made bi-weekly reports to Dr. Callery and the Department Secretary. (He was told that the Secretary did not read his reports.)

The drug vault is discussed at RX 9 at 36 *et seq*. Mr. Brown characterized it as a "glorified closet". In order to enter it, one must deactivate an alarm. At times the vault door was propped open with a wooden chock while transferring evidence. The chock is visible in a photo at SX 9 at 38. The worker in the same office is in a locked room logging in evidence. Very few OCME employees had access to the area. The vault door was opened all day. Propping it open while the hall door was closed was not a security concern.

A drug "pass thru" system is shown in a photo at RX 9 at 40. The system kept chemists out of the vault. Dr. Callery agreed they should not have vault access. When finished, the chemists returned the evidence through the same pass-thru lockers. Dr. Callery planned and inspected the "pass-thru" system, and helped secure funding for it.

The OCME "media electronics" room is discussed at RX 9 at 48-49. That room was always locked. The Department Secretary allowed them to spend a capped amount upgrading media systems. Though a better system was acquired, it was not the best. It was not the fault of Dr. Callery that funds were lacking. Dr. Callery was aware of funding issues.

Mr. Brown stated that he was testifying because he had received a subpoena. He does not socialize with Dr. Callery. He understands that police performed the instant investigation and provided information to the DOJ.

Dr. Callery offered the three-page collection of news media stories concerning "Police Officers Who Sell the Drugs They Seize". The exhibit was marked for identification as RX ID C. The exhibit had been removed earlier from RX 9 Before Mr. Brown was questioned about the media stories, Ms. Plerhoples was permitted to question Dr. Callery about them. Dr. Callery printed the articles which show police corruption. None of the reported cases occurred in Delaware. Mr. Brown stated that he had no personal knowledge about any of the cases.

Dr. Callery stated that he was submitting them to show of cases elsewhere. He believes DSP stole some drugs from the OCME. He is aware of "major miscounts" of drugs. He has no evidence of theft of drug evidence in Delaware Based on the answers to these questions, Ms. Plerhoples again objected to admission of RX ID C. The objection was sustained. In response to Dr. Callery, Mr. Brown testified that he is not aware of cases in which Delaware police officers stole drug evidence, nor cases in which OCME employees did so during the period 2009-2014.

Dr. Callery then offered into evidence an agreement signed in March 2007 by Dr. Callery and then-Attorney General Joseph R. Biden, III. The document was marked for identification as RX ID D. The agreement, *inter alia,* provides that the OCME may ask the Delaware DOJ to assist in internal investigations. (The comment by Dr. Callery regarding the agreement is that the DSP conducted the instant investigation.) Ms. Plerhoples objected to admission of the document on the basis of relevance. She stated that the DOJ did conduct this investigation through the DSP. Further, Dr. Callery had mischaracterized the content of the agreement. It neither proves nor disproves any fact in this case. The objection to the exhibit was sustained.

Mr. Brown testified that he is aware of the *State v. Tyrone Walker* case in which tampering was discovered by a police officer during his testimony in court. He and Dr. Callery discussed the case. They performed an internal audit. Mr. Brown is aware that the DSP seized a large amount of evidence from the OCME vault and moved it to Troop 2.

Mr. Brown was asked to read RX 9 at 54. He did so and then noted that it is problematic if an agency such as the DSP investigates itself. There is a "thin blue line" in police culture. Officers tend to protect each other. Ms. Plerhoples objected to the line of questioning. It is fair to rebut the DOJ report, but Mr. Brown has limited relevant knowledge. In this case the DSP did not investigate itself. This case is not about police work. There is no evidence in the case that any police policy caused drug thefts.

Dr. Callery argued that the DSP did investigate itself in this matter. There is evidence that drug losses occurred while evidence was in DSP custody. All police departments in the 46 cases mentioned above audited themselves. The places where thefts occurred have not been identified. Ms. Plerhoples responded that three OCME employees were identified and two were indicted, one for cocaine trafficking. Dr. Callery corrected Ms. Plerhoples and stated that there

were four OCME employees, not three. Ms. Plerhoples responded that the DSP is not on trial in this case. The inquiry takes the hearing far afield.

Dr. Callery asked how can he defend himself if he can not show that no investigation resulted in indictments of any OCME employee for drug thefts. Ms. Plerhoples argued that it is improper to ask Mr. Brown to give his opinion of the DSP investigation. Mr. Brown was not a member of the DSP. At this point I ruled that Dr. Callery may ask Mr. Brown if he knows about or participated in the DSP investigation, and then only as to the facts which he knows.

Ms. Plerhoples responded that Mr. Brown is unfamiliar with all of the documents in this case. On the other hand, DSP investigators did review all documents and statements. It would be speculation for Mr. Brown to state that a particular individual committed theft without further information.

Mr. Brown continued. The DSP was willing to fingerprint new OCME hires but wanted to charge OCME for the service. The Department refused to pay for the fingerprinting. Eventually the Secretary of Homeland Security waived fees. Mr. Brown added that the evidence lab and his and Dr. Callery's fingerprints are "all over it".

The subject of "critical requests for management help" is discussed at RX 9 at 62 *et seq.* Mr. Brown stated that OCME "swam against the tide" in trying to get help. It was discouraging because they were not listened to. Others did nothing. Mr. Brown's wife wanted him to resign. It was "beyond frustrating". Dr. Callery was frustrated and "disgusted". Dr. Callery supported Mr. Brown, but there was "no money left on the plate for us".

The subject of "misinformation about employee assignments" is discussed at RX 9 at 71 *et seq.* An allegedly unqualified employee is described at RX 9 at 72. Mr. Brown concurred that the employee had "deficits" and engaged in inappropriate behaviors. She made mistakes and

lacked attention to detail. She had a child and asked for leave under the ADA. She could not follow directions. She was moved to the receptionist position when others lost confidence in her. Mr. Brown stated that the DOJ has mischaracterized this matter in its report. Dr. Callery stated that the OCME "tried to be ethical with her."

"Misinformation" concerning OCME policies is discussed at RX 9 at 88 *et seq.* Mr. Brown testified that he was aware of deficient OCME policies in the Controlled Substance Unit and the evidence intake area. Dr. Callery had signed off on the policies. It is "preposterous" to claim that anyone was provided with misinformation. OCME policies were reviewed by accrediting agencies such as the International Association of Medical Examiners. Dr. Callery was responsible for OCME's accreditation. He wrote and approved the policies. The lab was fully accredited during Dr. Callery's tenure. The policies would "fill a bookcase". Dr. Callery was not negligent in this area. OCME was in compliance with national and international standards.

Misinformation on "employee time assignments" is discussed at RX 9 at 91 *et seq.* Mr. Brown stated that it was justified to permit some OCME employees to start work early while denying that opportunity to others.

The subject of drying marijuana plants in a box in a stairwell is discussed at RX 9 at 93 *et seq.* Mr. Brown testified that decomposing marijuana plants had been accepted. It was then not accepted. The plants had to be placed in the stairs because they were making employees nauseous. Police refused to pick up the plants. A drying machine was used on them (RX 9 at 95). The plants only fit in a tall stairwell, which was secure. The stairs were permanently alarmed. The process did dry the plants some. OCME worked with police "as best we could". OCME went "above and beyond". Though the process was not ideal, the marijuana was secured.

Mr. Brown was referred to RX 12 (the document captioned, "Is There Really a Drug Theft from OCME?"). Mr. Brown prepared the exhibit. It was a biweekly report to the Department Secretary and Deputy Secretary. The purpose of the report was to state certain facts in this case, and to ask that any investigation be "broader".

Mr. Brown stated that a large percentage of drugs brought to OCME were never tested because of case dismissals, guilty pleas and the like. Some evidence packages were never opened. If untested drug packages were to be returned to police, officers would not accept them if there was possible evidence of tampering. For instance, if a corner of a bale of marijuana were missing, the evidence would not be taken back. OCME employees had to be trained to care about tampering. OCME prepared a booklet on tampering which was approved by the DOJ and circulated throughout the State.

There are challenges presented when police agencies err. A common error is a drug counting error, or the entry of an incorrect count. That is discussed in RX 12. Ms. Plerhoples objected to testimony regarding the cases summarized in RX 12. The issue of "possible miscounting" calls for the witness to speculate. The objection was sustained.

From 2009-2014 Mr Brown was aware of cases in which drugs were miscounted but evidence was not tested. He added if an evidence package were never opened, it would not be known if there had been a miscount. The outside of packages reflect what is inside. But that can not be verified unless the package is opened. In 2014 Mr. Brown was unaware of any thefts from OCME. Some cases could have been police errors.

When Mr. Brown stated that he was unaware of the 46 cases mentioned earlier in the hearing, a question asking him to comment on which were tampering cases was objected to and

the objection was sustained. The State also objected to Dr. Callery going through each of the 46 cases with the witness on the basis of Mr. Brown's lack of independent knowledge.

Mr. Brown testified that no OCME employee stole evidence during the period 2009-2014. No death cases were tampered with. Mr. Brown stated that it would be hard to answer whether any tampering cases were the result of policy problems. Oversight was difficult due to a lack of staff and funding. Without deficits oversight could have been better. DSP seized evidence from the vault for public safety. Police chiefs could have spoken to the General Assembly.

OCME was a "stepchild" of DHSS. In Maryland labs are under the State Police. Dr. Callery stated that Delaware labs should be under the DSP if that was in the best interest of the State. He wanted what was best for Delaware citizens. This is not one of the most "egregious" scandals in the U.S. because there is no proof of thefts from the OCME.

Ms. Plerhoples cross-examined. Mr. Brown is aware of a case in which blood pressure pills were substituted for Oxycodone tablets and the tampering was discovered in court. An OCME audit was conducted. The case had the potential of being a problem in any Delaware evidence room. He agreed that it was appropriate for DSP to broaden its investigation. Mr. Brown gave a statement to the DSP in this matter.

With regard to Dr. Callery's private consulting work. Mr. Brown told the DSP that he was aware of an agreement allowing such work. He did tell investigators that Dr. Callery had used OCME resources. Mr. Brown believes that Dr. Callery became disassociated from his State work due to his frustration. Mr. Brown told Dr. Callery to curtail the private work. People were "wondering what he was doing". It would not "read good" in the media. Mr. Brown is also aware that Dr. Callery was doing State work on his own time. Dr. Perlman would not speak

with Dr. Callery about his private work. OCME began to defer all private work to a "separate box" and a "general account".

Mr. Brown was asked about Dr. Callery's private work by the OMB. A receptionist (Carolyn Babiarz) reported the private work. Mr. Smith asked about it. Mr. Brown answered DOJ questions about it.

Dr. Callery next called John Evans. He had been a State Police officer for 28 years as a trooper, criminal investigator, and an admin officer. In 2016 he was appointed Director of the Division of Forensic Science. He succeeded Michael Wolf. Since this testimony would concern the period after 2014, the State object on the ground of relevance. Dr. Callery promised to "truncate" his questions. He intended to show that Mr. Wolf faced the same problems which he confronted. The questioning was allowed.

Mr. Evans stated that he saw some autopsy cases during the period 2005-2008. Dr. Callery completed his tasks and determined manners and causes of deaths. He was not hard to work with. Prior to 2014 he found nothing which reflected negatively on Dr. Callery. At this point Dr. Callery rested his case.

The State was permitted to offer rebuttal evidence. Ms. Plerhoples offered a 10-page police report which contains OCME employee interviews concerning Dr. Callery's private business. The purpose of the offer was to address a point raised by Dr. Perlman. The exhibit was admitted as SX 2.

Dr. Callery then sought to offer certain transcripts of testimony by Officer Laird and Mr. McCarthy regarding the DSP investigation. The testimony was provided after an audit and after the OCME vault was cleared. It covers motions made after theft(s) were discovered. It includes testimony regarding the conduct of the audit and what had occurred. It clarifies the cases and

types of tampering in some missing drug cases. The State objected to admission of the exhibit. It is 140-pages in length, was being produced late in the hearing, and Ms. Plerhoples had not had a chance to review it. Dr. Callery stated that the new document does not add to the case. He withdrew the offer. All sides had therefore rested.

Closing arguments were then provided by the parties. On behalf of the State, Ms. Plerhoples argued that the three main issues in the case are Dr. Callery's plea to crimes substantially related to the practice of medicine, violations of the Medical Practice Act, and the performance of private consulting work by Dr. Callery while CME.

Dr. Callery held a position of public trust as CME which was permitted because he held Delaware licensure. The State does not contend in this case that Dr. Callery is not a competent forensic pathologist. Mr. McCarthy has agreed that while Dr. Callery is a good physician, he was a poor administrator.

Dr. Callery began to focus on private work at the expense of his work as CME. During the period 2008-2014 the OMB found that because of his private consulting practice, he engaged in dereliction of his public duties. His plea to two charges of Official Misconduct is conclusive with regard to that criminal conduct. The OMB report concluded that Dr. Callery had misused State resources. He had been warned not to do so by a superior. The conduct continued until January 2014. Ms. Vahey and Ms Hopper addressed his use of State time and facilities and supplies. The State had proven that Dr. Callery used his assigned State vehicle in his private work without permission.

Certain conflicts of interest proven in this case constituted violations of the Code of Ethics for State employees. Dr. Callery's dereliction of his duties at OCME led to an inability to adequately supervise that office. The hearing officer must weigh all the evidence. Lt. Wallace's

reports were corroborated by Dr. Callery's no contest plea. During the month of October 2013, Dr. Callery worked on 87 private cases and two public cases. Even if Dr. Callery had flexibility in his schedule, he was not permitted to perform private work at the expense of his OCME work.

The evidence shows that Dr. Callery was retained by a private attorney in Pennsylvania. He used his OCME assistant to set up private files. He used the OCME office and slides and prepared a private report during his State hours. He could have performed the private work on his own time.

Conflicts of interest have also been proven. In one case he testified contrary to the opinion of an Assistant ME. He also testified in private cases to which he was privy to information by virtue of his position as CME. He therefore demonstrated the appearance of or actual impropriety. Bd. Reg. 17.5 addresses the subject of "misconduct". The Wallace report describes multiple instances of violation of the State Ethics Code as well as the Delaware Criminal Code. These matters were corroborated by the firm hired to investigate by OMB.

The State concedes that the preliminary report in SX 1 is technically "hearsay". However, Lt. Wallace testified during this hearing as to his own personal observations as reflected in his report as well as the statements made by Mr. Brown. The State is not required in this case to prove that OCME employees stole drug evidence. Three or four of those employees were suspects. Lt. Wallace testified that a significant problem in this case was Dr. Callery's dedication of time to his private work.

The State is unaware of who may have stolen drug evidence from the OCME. However, on the organizational chart Dr..Callery was "at the top". The "buck stopped there". This case has had a large impact in Delaware as to hundreds of criminal cases. Many were overturned on appeal. Much State time and expense was therefore wasted. That Dr. Callery did not personally

witness any drug tampering is not an excuse in this case. His private work is tied directly to his inability to supervise. There is no evidence which shows that anyone else in OCME worked the way that Dr. Callery did.

In this case the State asks that Dr. Callery's medical license be suspended for two years. In fact that was part of his initial plea agreement. The State agrees that Dr. Callery is a competent physician and has no disciplinary history. In this case there are certain aggravating factors such as the frequency of violations, the nature and gravity of misconduct, selfish motivation, and a pattern of misconduct.

Dr. Callery then gave his closing argument. He agrees that he did enter a *nolo contendere* plea in Superior Court on charges of Official Misconduct. That plea was driven by personal, financial and health reasons. He concedes that he did use State stationery in his private work. He also agrees that he used the State vehicle for private travel. However, he was told he could use the car for private use for 20% of the time. He conceded that he had exceeded that percentage.

With regard to private autopsies, he did not use any State consumables. He provided his own histology slides. He paid the histologist privately. Dr. Nazario agreed that he could perform the work. In 2006 the Public Integrity Commission approved the arrangement. He received the Commission decision by way of subpoena. He did use the OCME conference room for private case depositions. Dr. Hameli approved of that arrangement because it was important that Dr. Callery be available in the building. Dr. Callery argued that he should have "kept up with changing times." He is not legally sophisticated and should have retained an employment attorney. That was a "major failing".

Dr. Callery only charged the State for the use of his personal slides one time. Thursdays were his day off. He used that day to attend to other matters at work. The presentence report prepared in the criminal matter concluded that Dr. Callery was "married to his job." Mr. Brown suffered a heart attack while working at the OCME. He asked, "what are we doing here?"

Dr. Callery argued that he did not contradict an Assistant ME in a case. A man was crushed in a silo. Dr. Callery performed the exhumation. He was the only Board-certified pathologist in Delaware. He had the appropriate credentials. The exhumation autopsy differed. He did not contradict Dr. Tobin regarding the decedent's suffocation and brain collapse. He documented trauma which Dr. Tobin had not seen. He added that autopsy cases are "not highly remunerative".

Dr. Callery agreed that there was faulty security at OCME. The systems were updated as best they could do so. Dr. Callery disagrees with Dr. Perlman that Mr. Brown was at fault for some problems. She did not understand what OCME was going through. Dr. Callery could not supervise Dr. Hans in the Toxicology Lab because she was ill.

Dr. Callery does not know who stole drugs at OCME. It was an honor to serve as CME. Dr. Callery added, "I'm not a Bradley...a LeRoy." He agrees that he entered the plea in the Official Misconduct cases. He was "between a rock and a hard place". There was a substantial investigation which was publicized. He received death threats, and had substantial legal bills.

Dr. Callery argued that a six month probationary period for his license would be appropriate in this case. He agreed that when he entered his plea in court a two-year license suspension was discussed. He asked for a lighter recommendation. He stated that he "expects the Board to revoke me." He asks for understanding from the Board, and that the Board consider his mitigating circumstances. He did not intend to engage in misconduct.

He got his State work done. He added that he had more cases than Dr. Perlman. Some of his assistants earned more than he did. He has "soured on the system" in Delaware. He thanked Ms. Plerhoples and the hearing officer for their "professionalism".

In rebuttal, Ms. Plerhoples stated that the focus in this case is the OCME, not the DSP. Three suspects were developed among OCME employees. Of those, two were indicted. One entered a plea to trafficking cocaine. Finally, she argued that Lt. Wallace was not saying that a letter from the Public Integrity Commission does not exist.

Findings of Fact

The notice of this hearing provided Dr. Callery with the date, time and place of the proceedings. The notice also provided him with a statement of his hearing rights. The date, time and place were agreed to by Dr. Callery before the hearing notice was sent to him. Dr. Callery in fact received the hearing notice, and attended the entirety of the hearing.

Richard T. Callery, M.D.is an active licensee of the Delaware Board of Medical Licensure and Discipline. His initial Delaware license was issued in 1989. He is also licensed in Rhode Island. Dr. Callery's medical specialty is Pathology, with a sub-specialty in Forensic Pathology. According to the record in this case, during relevant times he was the only physician in Delaware Board-certified in Pathology and trained in that sub-specialty.

Dr. Callery began his Delaware medical career in 1989 when he was hired as an Assistant Medical Examiner (AME). He was hired by Dr. Ali Hameli, Chief Medical Examiner (CME), to work in the Office of Chief Medical Examiner (OCME).

During his early years in the OCME, Dr. Callery also worked at St. Francis Hospital in Wilmington as a Surgical Pathologist. He performed pathology work at St. Francis during times when he was not required to be performing work in the OCME. According to the record, the

CME was aware of Dr. Callery's work for St. Francis and approved of Dr. Callery holding the two positions. He did so until 1992.

In 1992 Dr. Callery elected to become a full-time pathologist at St. Francis and apparently resigned his AME position in OCME. He did so because his family was growing, and the full-time position at St. Francis offered an increase in compensation.

At some point after he became a full-time pathologist at St Francis, he agreed to return to the OCME as an AME. In that position he was engaged in histology on weekends. Eventually Dr. Callery was contacted and informed that the incumbent CME had been terminated. Then-Secretary of the Delaware Department of Health and Social Services Nazario asked Dr. Callery to accept the position of interim CME. Dr. Callery accepted that position when the President of St. Francis gave his consent.

Dr. Callery therefore became Acting Delaware CME from 1994-1997. During that period he also continued to perform some work at St. Francis on a part-time basis. Dr. Callery received good job evaluations during this period. Eventually Dr. Callery became the permanent CME for the State in August 1997. He held that position until his suspension as CME in February 2014, after which he was terminated.

During the hearing testimony was provided by different witnesses regarding the various parts of the hierarchical structure within OCME during Dr. Callery's tenure. Though Dr. Callery submitted a diagram of the structure which apparently names positions and personnel at OCME during Dr. Callery's years, the diagram is so small as to be unreadable. RX 9 at 1.

Nonetheless, an "overview of the OCME" is found in a "preliminary" investigative report issued by the Delaware Department of Justice (DOJ) and the Delaware State Police (DSP). SX 1 at 14. Dr. Callery did not argue that the "overview" was an inaccurate description of the

OCME. The OCME was one of 12 divisions within the Department of Health and Social Services (DHSS). (The reference to the OCME is stated in the past tense because in June 2014 then-Governor Markell signed legislation which abolished the OCME and created a new Division of Forensic Science within the State Department of Safety and Homeland Security. 29 *Del. C.* Ch. 47. SX 1 at 4.)

According to the "overview", a Forensic Sciences Lab was established within the OCME by statute. 29 *Del. C.* Sec. 4708. Housed within the OCME were the following units: Death Investigation, Histology, Toxicology, Controlled Substances, DNA and Arson. The entire office was overseen by the CME. The CME reported to the Deputy Secretary of DHSS, Henry Smith. Mr. Smith in turn reported to the Secretary of DHSS. During Dr. Callery's tenure, a "senior management team" within OCME consisted of the CME, the Deputy Director, the Deputy Chief Medical Examiner, the DNA Technical Leader, the Chief Toxicologist and the Controlled Substances Laboratory Manager. SX 1 at 19.

The Controlled Substances Unit (CSU) received from Delaware law enforcemenet agencies and analyzed substances suspected of containing illegal or dangerous substances. Within the CSU were housed Analytical Chemists, Laboratory Technicians and Forensic Evidence Specialists. The chemists performed analysis and identification. The technicians maintained CSU instrumentation. The specialists received evidence, logged it into a "FLIMS" system, stored the evidence in the drug vault, transferred the evidence to chemists, and returned the evidence to law enforcement agencies. Specialists also seized, stored and destroyed drug evidence, and transported the evidence from all locations in the State to the OCME. SX 1 at 20. Suffice to say that the OCME was a large organization which performed many important functions. According to the organizational chart at RX 9 at 1, the OCME consisted of

approximately 58 personnel when fully staffed. The CME position sits atop the hierarchical structure.

Apparently early in his term as CME (or before), Dr. Callery stated his intention to perform "private" forensic pathology work while serving in his State position. Dr. Callery testified that many medical examiners in the country make themselves available to perform private pathology services while serving in official public positions. This form of private professional work apparently often comes in through private attorneys who are interested in retaining an expert pathologist to assist in proving certain matters of death causation or other related forensic issues which have arisen or will arise in civil litigation.

The issue of "private work" while CME was known to Dr. Callery's superiors. For instance, it was agreed by Secretary Nazario that Dr. Callery could continue to engage in practice at St. Francis Hospital when he returned to the office as acting CME in 1994.

Without contradiction, Dr. Callery testified that former CME Dr. Hameli had approved of the private consultation work. The evidence shows that Secretary Nazario was also aware of and approved of Dr. Callery's private work while CME. Dr. Callery testified that he assumed that Secretary Nazario's approval of the arrangement was binding on the Secretary's successors. However, the agreement was apparently never reduced to written form. If there were such a written understanding regarding Dr. Callery's concurrent private pathology practice, it was not produced as an exhibit in this case.

The private pathology work involved the use of the OCME premises for certain consultative activities. Dr. Callery was given permission to use a decomposition room at OCME to perform "private" autopsies. He also used a conference room near his office to meet and consult with private attorneys involved in ongoing legal proceedings, and to provide sworn

depositions in conjunction with litigation. Dr. Callery testified that, in addition to personal convenience, the performance of these functions within the confines of the OCME would make him available should he be called out to a death scene or other place where his State services were required.

The private work required administrative and professional support by others within OCME. The record in this case established that Dr. Callery's secretary or administrative assistant would often field phone calls concerning the private cases. In certain autopsy cases it was necessary that Dr. Callery engage an OCME Histologist to assist. He testified that when a Histologist was so employed by him, he or she would be paid separately by Dr. Callery for the professional services. The record also established that, on occasion, a clerical employee at St. Francis would perform transcription services or type reports generated for the private cases.

In this case the State also alleged that Dr. Callery at times used certain State supplies in conjunction with his private work. Dr. Callery admitted that he did use State stationery on occasion. The State alleges that he used other paper supplies paid for with State funds such as folders for private files. Though the State alleged that Dr. Callery would also use State glass histology slides in the private cases, Dr. Callery testified that he personally purchased a supply of the slides for that purpose.

Because of his position within the OCME, Dr. Callery was also assigned a State-owned vehicle. The personal use of that vehicle by Dr. Callery became a subject of dispute in this hearing and will be discussed below.

Based on my assessment of this hearing record, and in the absence of arguments to the contrary, I find by a preponderance of the evidence that those in a supervisory role over Dr. Callery knew that he was engaged in a private pathology practice while he served as CME. I

further find that Secretary Nazario and perhaps others within DHSS had approved of his engagement to perform privately retained consultative work. When Dr. Callery served as an AME under the previous CME, Dr. Hameli did not object to the arrangement. To repeat, it is not contradicted that other medical examiners in the U.S. had similar arrangements. Presumably the work allowed publicly employed physicians to supplement their incomes. Nor was Dr. Callery's statement contradicted that there are very few physicians in the country who are Board-certified in the sub-specialty of Forensic Pathology. Hence, the demand for such services in private litigation is likely substantial.

That said, I further find that those in a position of authority over Dr. Callery while he served as CME placed a condition on the concurrent performance of official duties and private consultations. That condition was that the latter would not interfere with the former. In other words, the preponderance of the evidence establishes that certain latitude was given to Dr. Callery to engage in private work while CME, but if and only if public functions as CME always took precedence over the private work. Dr. Callery did not argue that such a logical and necessary condition was not agreed to and did not constrain his private consultations. Former DHSS Secretary Meconi recalled to a DSP investigator that he had insisted that Dr. Callery perform the private work on his own time.

An in-court evidentiary fiasco occurred in January 2014 which triggered parallel investigations of the OCME by both the Department of Justice (DOJ) and the Delaware State Police (DSP). While on the witness stand, a testifying police officer opened an evidence envelope and discovered that Oxycodone pills had been tampered with. It was later determined that the drug evidence had been tampered with while it was in the custody of OCME. According to the State's complaint, that discovery resulted in an investigation of drug evidence processed in

the OCME's Controlled Substances Unit (CSU). That investigation led to the discovery of "multiple instances" in which drug evidence was missing or had been replaced by other substances. SX 1 at 2.

The DSP investigation was led by Lt. Robert Wallace, a 21-year veteran with the State Police. In his sworn testimony Lt. Wallace acknowledged that he was the author of the lengthy police report found at SX 1 at 91-110. Lt. Wallace also testified that he was consulted in the preparation by the DOJ of a companion investigative report of OCME which is in evidence at SX 1 at SX 1 at 13-36. Lt. Wallace testified at length during this hearing. He was available to Dr. Callery for cross-examination as to the facts found during the investigation and the conclusions which he drew from those facts.

Lt. Wallace testified that he personally interviewed more than 100 individuals during the investigation, some more than once. He also reviewed a substantial number of documents maintained by OCME and by the Department of Health and Social Services.

Lt. Wallace testified that the "investigative results" or conclusions drawn from the investigations are set forth at SX 1 at 96-106. Those conclusions will be summarized below. Again, Dr. Callery was given substantial leeway in his presentation of evidence and in his questioning to impeach Lt. Wallace and to explore or refute the bases for those conclusions. Though he took issue with some of the conclusions reached by Lt. Wallace, most of the factual findings resulting from the investigation by Wallace and others within the DSP were not refuted or contradicted by Dr. Callery.

Lt. Wallace testified that he determined that Dr. Callery was required to work at least 37.5 hours per week as CME, unless he had been granted permission to shift his schedule. Dr. Callery was afforded a degree of flexibility in his work schedule. Lt. Wallace also had

determined that Dr. Callery made certain personal use of a State-assigned vehicle without permission. He also found that Dr. Callery had made or received a high volume of phone calls pertaining to his private work on his OCME telephone. In certain "private" cases Dr. Callery had conflicts of interest with his public work as CME. Dr. Callery had used State CME stationery and other State-purchased paper products in some of his private cases.

Lt. Wallace further testified that, in his opinion, Dr. Callery was "self-absorbed" and had acted surreptitiously in the intermingling of his public and private work. Lt. Wallace stated that those in a position of authority over Dr. Callery expected him to perform the private consultation work on his "own time". Lt. Wallace had concluded that Dr. Callery was "consumed" with his private work while CME. Lt. Wallace testified that a fair estimate of the value of State time "stolen" by Dr. Callery and the value of State resources used by him in private work was $100,000. As a result of certain events while Dr. Callery was CME, drug evidence had to be retested and sent to private labs for analysis. Criminal cases were dismissed.

Lt. Wallace personally observed security and other issues in the OCME. These issues included problems with key fob door access, inadequate security cameras, a vault door propped open, an exhibit tracking system which did not account for all evidence then in the OCME, and "spotty" records concerning exterior door access.

Lt. Wallace's more detailed conclusions are listed in his report at SX 1 at 96-106. I will briefly summarize them here. He opens the "results" section by stating that during the period 2009-2014 (and perhaps before) Dr. Callery had committed criminal and ethical violations. The report cites Dr. Callery's use of his State email account and phone "to conduct private business". OCME facilities were used for the work, as were State-owned equipment and materials. *Id.* at 96.

Lt. Wallace concluded that Dr. Callery had used his administrative assistant as a "gate keeper for (his) private consulting business". A State Histologist supported his private cases. In all, Lt. Wallace found that Dr. Callery had at least five OCME employees working on his private consultations. This was "tantamount to operating a nearly pure profit business". In his private practice Dr. Callery's CV was printed on State letterhead. *Id.* at 97.

During years relevant to the investigation, Dr. Callery was also performing pathology services for the Chester County PA Coroner's Office. Also during the period 2008-2011 Dr. Callery performed 173 exams or autopsies for the Rhode Island Office of State Medical Examiner. During that time he was paid $188,565 for the Rhode Island work. Lt. Wallace concluded that Dr. Callery was misrepresenting his professional experience and hospital affiliations on the CV. *Id.*

Based on available GPS data, Lt. Wallace concluded that Dr. Callery had "repeatedly" used his assigned State vehicle for out-of-state private consultation work and for personal trips. Investigators found that out-of-state travel in the vehicle was prohibited unless approved. Such travels included driving to Hershey Medical Center, Hershey PA in July 2009 to review medical records in a private case and overnight travel to Chambersburg PA in March 2010 to give testimony in a private case. It also included overnight travel to Farmington CT in October 2010 to provide court testimony in a private case. In two of the cases Dr. Callery billed private law firms for his travel expenses though he was using the assigned Delaware vehicle. *Id.* Lt. Wallace found that in October 2010 Dr. Callery used the State vehicle to travel overnight to New Brunswick NJ to testify at trial in a private case. *Id.* at 98-99.

Lt. Wallace further concluded that, during times relevant to this case, Dr.Callery had used the main OCME phone number to conduct his private consulting practice. Dr. Callery's

secretary or assistant logged his phone calls. During the period September 2012-March 2013 78% of the calls were related to Dr. Callery's private practice and 16% were related to State business. The data represents messages only, and does not include private calls taken by Dr. Callery. *Id.* at 99.

Lt. Wallace also found that during times relevant to the investigation Dr. Callery was storing about 20 file drawers of private consultation files at OCME which were maintained by his State-salaried assistant. Those files were moved to his home when he was suspended from his CME position. The files were seized pursuant to a search warrant and yielded evidence that State materials and supplies were used in creating them. *Id.*

Investigators further found that, during the period under investigation, Dr. Callery would use an OCME conference room for meetings and depositions in his private business. Most of the meetings and depositions occurred "during normal business hours". The DSP found no evidence that the State had been reimbursed by Dr. Callery for the use of premises. Examples are provided in the report. In one private case four visitors appeared at OCME early in the afternoon on a Monday and then signed out at 5:20 p.m. *Id.* at 100.

The investigation also focused on Dr. Callery's performance of "private" autopsies at OCME during the relevant time period 2009-2014. Dr. Callery employed three separate dieners to assist. One was a State employee. By way of example, Lt. Wallace summarizes two such procedures. One "private" procedure consumed approximately three hours of Dr. Callery's "State" time in July 2012. Another consumed approximately the same amount of time in November 2012. During both procedures Dr. Callery employed a private diener. *Id.* a State histologist collected tissue samples and created slides during the latter and while working on State time.

State histotechnologist Gail Vahey often performed histology work in conjunction with Dr. Callery's "private" autopsies. According to Lt. Wallace's report, between 1998 and the time of Dr. Callery's departure from State employment, she processed 2,236 slides in 181 cases for him. Most of the histology work was performed by Ms. Vahey on her "State" time. Dr. Callery would pay her by private draft at $25 per case. Mr. Brown stated his concerns to her in May 2013. Thereafter, Ms. Vahey did most of the private histology work on her own time. Lt Wallace found that, in performing the histology work, Ms. Vahey would use State-supplied solutions, slides, microtome, scalpels and biohazard disposal services. Ms. Vahey is not aware of any reimbursement to the State by Dr. Callery for those supplies and services. *Id.* at 101.

Lt. Wallace determined in his investigation that Dr. Callery was expected to work 37.5 hours per week as CME. Each month he accumulated 13.25 hours in vacation leave and 9.5 hours in sick leave. He was permitted to accumulate "compensatory time". *Id.* In his report Lt. Wallace concluded that Dr. Callery engaged in a "conscious effort...to conduct his private business while on State of Delaware time." In one instance Dr. Callery was apparently offered the opportunity by a private attorney to participate in a conference telephone call on a Sunday. Dr. Callery stated that "(t)his really has to be done during work hours." *Id.* at 102.

In his report Lt. Wallace provides several examples of cases in which Dr. Callery failed to use vacation time, sick leave, or compensatory leave in conducting his private consulting business. In January 2009 Dr. Callery was compensated privately for his testimony in a Massachusetts homicide trial. That engagement caused him to be absent from his Delaware office for two days. He did not claim vacation time, compensatory time or sick time for his absence. In a second case Dr. Callery in December 2010, Dr. Callery was absent from his Delaware office for all or part of three days in order to testify in a case in New York City.

Though in an email uncovered during the investigation Dr. Callery claimed he was taking "time of work" for the private engagement, he did not claim the use of sick leave, vacation time or compensatory time for the trip. *Id.* at 102-103.

During all or a portion of the time relevant to this case, Dr. Callery was employed as a "contractual pathologist" by the office of the Rhode Island State Medical Examiners. He would bill that State for his time pursuant to a fee schedule. Autopsies were billed by him at $1,100, $400 for scene visits, $300 for "external views", and the like. During the period January 2009-August 2011, Dr. Callery billed the State of Rhode Island a total of $166,665 for "20 blocks" of his time. In June 2010, during a period of Sunday-Wednesday, Dr. Callery worked as a "contract pathologist" for Rhode Island. He did not claim sick time, vacation time or compensatory time for the period Monday-Wednesday while working for Rhode Island. Again, Dr. Callery did not claim any such time during another three day absence from the OCME while working in Rhode Island in February 2011. *Id.*

Some time during the hearing was devoted to Dr. Callery's travel to Colby College in Waterville ME for the "New England Seminar in Forensic Sciences", an annual event. Lt. Wallace determined that Dr. Callery had served as a compensated moderator during the seminar during the period 1997-2013. Pursuant to a subpoena, the college produced certain payment and reimbursement records concerning Dr. Callery. In 2011 Dr. Callery had submitted a reimbursement request for his travel to Maine, though he had driven to and from the college in his assigned Delaware vehicle. Moderator fees from $1,000-1,250 were paid to Dr. Callery while he was being compensated by the State of Delaware as CME. *Id.* at 104.

At some point during the investigation of Dr.Callery, a GPS device was installed on his assigned State vehicle. For the years 2009-2011 GPS data with respect to location of the State

vehicle at OCME was compared by Lt Wallace with the time which Dr. Callery had claimed as "compensatory time" for those dates. For the three-year period 2009-2011, Dr. Callery had claimed 198.5 hours, 167 hours and 55.5 hours as compensatory time, respectively. During those three years the State vehicle, however, was parked at OCME for only 54, 56 and 17.5 hours, respectively. Lt. Wallace concluded that Dr. Callery had therefore committed "theft" of $13,922, $10,841 and $3,755, respectively. In his report Lt. Wallace concedes that Dr. Callery may have performed OCME work "off site" or at home on certain days. That "off site" work may account for some of these differences. However, Lt. Wallace could find no evidence suggesting that Dr. Callery was performing autopsies or body inspection off site or at home. *Id.* at 105.

Based on facts learned during the investigation, Lt. Wallace concluded that Dr. Callery had violated certain provisions in the Delaware Employees', Officers' and Officials' Code of Conduct Act, 29 *Del. C.* Ch. 58 and the Delaware Transportation of State Employees Act, 29 *Del. C.* Ch. 71. The bases for those conclusions included (a) the finding that Dr. Callery's private consulting work had interfered with his ability to perform his duties as CME; (b) testimony in court on behalf of a private client which questioned the opinion of an AME; (c) use of his position as CME to secure private clients; (d) use of State facilities and resources in conducting his private consulting business; (e) use of his State-assigned vehicle for out-of-state travel in conjunction with his private work; (f) failure to disclose a private interest in an OCME case; (g) failure to file personal financial disclosure statements; (h) failure to claim leave while engaged in private consultative work at times when he was to be acting as CME, and others. *Id.* at 107-108.

Lt. Wallace stated that as a result of a number of these findings, Dr. Callery had "failed to perform and/or was neglectful in the performance of his duties as Chief Medical Examiner which resulted in systemic operational failings of the OCME and created an environment in which drug evidence could be lost, stolen or altered, thereby negatively impacting the integrity of many prosecutions. These systemic failings included lack of management, lack of oversight, lack of security, and lack of effective policies and procedures." *Id.* at 108. Lt. Wallace concluded that Dr. Callery had blurred "the lines of his State of Delaware work with his private consulting business." When confronted with certain claims, Lt. Wallace further concluded that Dr. Callery would deflect blame to others, explain away his actions as bookkeeping errors, and claim that he had prior approval to engage in certain activities without producing documentation of such approvals. Finally, Lt. Wallace concluded that Dr. Callery "violated the trust of the citizens of the State of Delaware, employees of OCME, and clients he served...." *Id.* at 110.

As noted above, the Delaware State Police (DSP) conducted the investigation of Dr. Callery and the OCME in conjunction with the Department of Justice (DOJ). The State placed in evidence an undated "preliminary" report of the findings resulting from that joint investigation. SX 1 at 13-36. The report is preliminary because it was issued before the investigation had been concluded. During his testimony Lt. Wallace, as lead DSP investigator in the case, confirmed that some or most of his investigative findings and conclusions were incorporated in the report, and that he agreed with the conclusions stated in it. Again, Dr. Callery had an unobstructed opportunity during this hearing to question Lt. Wallace on the content of the preliminary report.

To the extent that the joint DSP-DOJ report repeats matters already summarized here, those facts will not be repeated. I will, however, summarize for the Board certain matters which have not already been provided in these findings of fact.

The purpose of the preliminary report was to inform the public, to update the Delaware judicial system on matters which may impact on the courts, and to "advise defendants of matters pertaining to the prosecution of their offenses." SX 1 at 14. The preliminary report begins with a summary of the discovery by a police officer, during trial and while on the witness stand, of an envelope thought to contain Oxycodone but which actually contained blood pressure pills (metoprolol). Deputy Director Hal Brown was informed of the incident. The preliminary report states that OCME concluded the "discrepancy was believed to be an OCME recordkeeping error." *Id.* at 16.

Certain other evidence in the custody of OCME was then examined. After at least two other cases of potential tampering were discovered, further submissions of drug evidence to the OCME were suspended in early February 2014. An additional review of drug evidence housed at all DSP Troops was initiated. Later in February an OCME internal audit was suspended and OCME employee access to the drug vault was revoked. *Id.* at 18.

The prelimary report describes the organizational structure of OCME and the various authorized positions within that hierarchy which have been summarized previously. The report also describes the physical layout of the OCME premises, as well as access procedures to different areas within the office and the receipt and storage of drug evidence.

The report also summarizes the OCME security system as it existed at the time of the investigation. Investigators found that there was "no consistent, established criteria for the distribution of the alarm code to OCME personnel." *Id.* at 24. The report further notes that computerized evidence of door entries resulting from key fob access all show "an entry date of January 1, 1970." Corrective action has not been taken to resolve that "glitch". *Id.* at 26. Key fob access by OCME employees as they changed assignments within the office, or left OCME

employment. Investigators determined that, on occasion, certain doors in the facility were propped open. *Id.* at 27-28.

Investigators further determined that employment screening of new hires and routine drug screening to monitor OCME employees was "limited". *Id.* at 29. During his testimony Dr. Callery explained that sufficient funding was not provided in his budget to perform more extensive screening.

Investigators also found that, in some instances, OCME employees were placed in positions for which they were not qualified. In some instances that may have been caused by a shortage of full-time State employees, or unanticipated departures of personnel from OCME. As a result of certain findings, OCME has stated that one goal is to revise operational policies and procedures. *Id.* at 30-31.

The preliminary report also summarizes the procedures governing evidence receipt and handling. Investigators found records showing delays between dates of receipt of evidence and dates when the same evidence was "logged in". Certain data entry errors were also identified. While OCME records indicated the presence of approximately 8,568 pieces of evidence on February 20, 2014, in fact approximately 9,273 pieces were present. *Id.* at 34.

It was reported to investigators that, on occasion, certain "loose drugs" were found on the floor of the drug vault. A former OCME employee opined that a dehumidifier in the vault was drying evidence seals and perhaps causing the spillage. A lab manager was known to keep certain "old" evidence in a separate box in the vault. Dr. Callery testified that, at times, such evidence was used in order to conduct drug training. *Id.* at 35. Deficiencies were noted with regard to the logging and tracking of drug evidence seized at death scenes. *Id.* at 36. Retention policies in regard to older drug evidence were not always complied with. *Id.* 38.

The narrative portion of the preliminary report closes with a discussion of the "overall impact" of the investigation. *Id.* at 40-43. The report concludes that the impact of the "issues" identified on the Delaware criminal justice system is "profound". "Criminal cases have been dismissed, charges have been reduced, and thousands of offenders are seeking to overturn their convictions." *Id.* at 41. The author of the report concludes that more than 200 drug charges have been dismissed and 60 cases reduced "as a direct results (sic) of the OCME failures." In excess of $100,000 has been expended for drug tests by an outside laboratory. *Id.* at 41.

The report further states that "Callery is currently the subject of an ongoing investigation related to his position as Chief Medical Examiner. Therefore, a full description of his conduct cannot be offered at this time." *Id.* at 42. The report also references criminal prosecutions pending against Farnam Daneshgar and James Woodson stemming from their OCME employment. *Id.*

The preliminary report closes with a list of 46 brief case summaries in which drug evidence tampering may, or may not, have occurred. *Id.* at 43-48. The report states that audits of the evidence had uncovered "potentially compromised evidence" During Dr. Callery's cross-examination, Lt. Wallace testified that he had little or no present knowledge of the cases and was not able to discuss them in any detail, including those cases in which the DSP was the law enforcement agency which generated the evidence. The cases concern drug evidence submitted to the OCME during the period 2010-2013. The evidence had been collected at various times by the DSP, Wilmington and New Castle County Police Departments, and various other Delaware municipal police departments.

My assessment of Dr. Callery's questions to Lt. Wallace regarding the 46 case summaries is that he was attempting to show that the witness could not identify any case in

which an OCME employee had been definitively proven to have stolen or otherwise tampered with drug evidence in the custody and control of OCME while Dr. Callery served as CME. The State's attorney apparently conceded that she was not prepared to prove that one or more employees of the office had done so. She added that the legal allegations in the State's complaint are not premised or dependent on proof of such thefts or tampering.

Questioning of Lt. Wallace on this issue was not productive due to his limited knowledge or lack of knowledge of the listed cases. Though Mr. Daneshgar and Mr. Woodson may have been charged with thefts or tampering while at OCME, in the end neither was convicted after trial or found guilty after a plea to such conduct. I find, as a matter of fact, that though the record in this case may raise some fair inferences about the conduct of OCME employees who had access to the drug evidence, nonetheless acts of theft or tampering by any particular OCME employee has not been proven.

The record also contains a report dated June 24, 2014 from Monica Gonzalez-Gillespie, Director of Labor Relations & Employment Practices of the Delaware Office of Management & Budget (OMB), to Rita Landgraf, Secretary of the Department of Health & Social Services. SX 1 at 49-76. Though the report constitutes "hearsay" in that neither Ms. Gonzalez-Gillespie nor others at OMB testified as to its contents, nonetheless it is part of the record and its hearsay nature is not a basis on which to exclude its contents in this case.

After summarizing the scope of its investigation, the OMB report then lists State statutes, policies and rules which framed the investigations. Those authorities fell into three categories: misuse of state resources, violations of the State Code of Conduct, and dereliction of duties. *Id.* at 52. The report notes that a "non-binding" 2007 opinion of the State Public Integrity Commission in another case held, *inter alia*, that a State employee engaging in private consulting

work "may not use State resources or time for his private business", citing to 29 *Del. C.* Sec. 5806(e). After summarizing certain State laws, the OMB report discusses a "representative case" which, in the opinion of the author of the report, is an "example of the degree and extent of the misconduct discovered during this investigation." *Id.* at 56.

I will briefly summarize the "representative case" chosen by the author. Dr. Callery was engaged by a private Philadelphia attorney to serve as an expert witness in November 2012. *Id.* at 56. On the day of his retention, Dr. Callery informed the attorney that an OCME laboratory would be made available "so that experts can examine the specimens together." Dr. Callery then scheduled teleconferences in the case for two State workdays in February 2013. Dr.Callery offered an OCME lab so that the parties in the case could "excise specimens and make slides." The lab would be made available on two State workdays in March 2013. *Id.* at 57.

Thereafter a State Histologist (Gail Vahey) apparently prepared slides for Dr. Callery and the other parties in the case. Dr. Callery would not release the slides to the attorney until he was paid $2,625 for three sets, or $875 per set. The Philadelphia attorney paid the full amount. The attorney's courier was instructed to ask for Dr. Callery and to place the check in a sealed envelope addressed to him. According to the report, Dr. Callery exchanged more than 20 emails on the day the slides were paid for and picked up. Subsequently another set of the slides was provided at the same cost. *Id.* at 58-59.

The OMB report summarizes Dr. Callery's responsiveness to the requests of the attorney who retained him. *Id.* at 60. In September 2013 Dr.Callery instructed the private client that the $3,500 paid for the sets of slides should not be included on an IRS W-2 form. The author of the OMB report therefore concluded that he had not claimed the funds or any portion of them as

wages received. In addition, Dr. Callery did not reimburse the State for the cost of the slides, despite having received payment for them from a private source. *Id.* at 61.

According to the author of the OMB report, the "representative case" provides evidence that Dr. Callery had misused State resources, including personnel and OCME facilities. In addition, Dr. Callery used State technology for the private engagement in the form of more than 180 emails and attachments. The author found "most troubling" the fact that Dr. Callery had received $3,500 in payments for work preparing the slides but did not tender those payments to the State. *Id.* at 61-62.

The OMB report further found that Dr. Callery had received private financial benefit when he used his position to provide access to OCME facilities and histology assistance to the private client. OMB further found that Dr. Callery had regularly corresponded with the private client, engaged in meetings, reviewed documents and prepared expert witness reports on State workdays. *Id.* at 62.

Dr. Callery was given a reminder in September 2013 about appropriate use of State resources. In October 2013 Dr. Callery sent or received in excess of 700 emails regarding his private consultative work. In the same month 59 phone calls were made from the OCME office to his private clients. He used an office scanner 11 times to scan documents related to his private cases. OCME personnel printed more than 100 pages for him which were related to those cases. Though he maintained a personal telephone number and email address at the time, he often instructed his private clients to contact him at OCME. *Id.* at 63. (In May 2013 Deputy Director Brown set up a gmail account and Google phone number for Dr. Callery's private work. Dr. Callery told OCME staff to disregard Brown's order to direct private callers to those contacts.) His staff continued to take and relay messages to Dr. Callery on his private cases even after

Secretary Landgraf had informed him in December 2013 that he was being investigated for misuse of State resources. *Id.* at 64. (Later in the OMB report it is noted that Dr. Callery's arrangement was a four-day week, with Thursdays off. However, Dr. Callery failed or refused to schedule his private work for Thursdays. He intended to schedule most of the private work on days when he was supposed to be performing the duties of his office. *Id.* at 75)

OMB found that Dr. Callery's Administrative Assistant, Ms. Hopper, devoted 2-3 hours each workday to Dr. Callery's private work. The report identifies six others who took calls for him regarding the private cases. State Histologist Vahey "frequently" prepared slides for Dr. Callery to use in his private work. *Id.* at 65.

OMB further found that Dr. Callery stored "voluminous" private case files at OCME. As reflected in this record, Dr. Callery performed "private" autopsies in OCME facilities. When interviewed in March 2014, Dr. Callery estimated that he performed fewer than ten private autopsies per year at OCME. However, by extrapolation it was determined that the total was closer to 38. For tax year 2012, for instance, Dr. Callery's personal tax return reflected that he was deducting $5,800 for the services of an autopsy assistant. The assistant, Gary Hartung, invoiced Dr. Callery $150 per private autopsy. At that rate, a total of approximately 38 were performed by Dr. Callery at OCME in 2012. *Id.* at 66.

The OMB report then summarizes findings regarding Dr. Callery's "conflicts of interest." In January 2013 Dr. Callery was contacted by the office of a Delaware attorney regarding a client who had just died and who had been represented in regard to a worker's compensation claim. Dr. Callery apparently reviewed certain documents and deemed the matter a "non-medical examiner case". He declined to accept jurisdiction. Thereafter he was retained as an expert witness by the decedent's estate in the same matter.

In a second matter later in 2013, Dr. Callery appears to have hidden the fact that the same law firm may retain him as an expert by altering an email. *Id.* at 68-69. OMB investigators also determined that Dr. Callery had been retained in his private capacity to serve as an expert in at least seven cases handled by OCME. *Id.* at 69.

In 2011 Dr. Callery was privately retained by a law firm retained by the estate of a claimant. He performed an autopsy on an exhumed body without notification to the defendant. The Industrial Accident Board subsequently found that Dr. Callery's actions disadvantaged the defense. In the same case Assistant ME Judith Tobin had earlier determined that no autopsy was required in the case. Dr. Callery subsequently testified that that decision was "not in accordance with OCME practices." In short, Dr. Callery contradicted the testimony of Dr. Tobin and was compensated for his services in the case. *Id.* at 70-71.

Finally, the OMB report found that Dr. Callery used Department letterhead in creating his curriculum vitae. A list of cases in which he had testified was also placed on Department letterhead. *Id.* at 72.

One of the final sections of the OMB report is captioned, "Dereliction of Duties". The report notes that Dr. Callery's credibility had been so compromised that he was no longer able to serve as a State's witness (an essential function of the CME). The report cites to the DOJ/DSP report which had concluded that a "systemic lack of management, oversight, security, and effective policies and procedures" had resulted in an environment in which drug evidence "could be lost, stolen or altered." *Id.* at 72-73. Dr. Callery's "failure to effectively manage" OCME had led to "wide-spread and ongoing harm to the State." *Id.*

The OMB report notes that because of his compromised credibility, the State had to retain a private expert for two homicide trials. OMB also found misrepresentations in Dr.

Callery's CV with respect to a list of hospitals where he enjoyed privileges. *Id.* at 74. As an aside, the author of the OMB report notes that the Code of Ethics of the National Association of Medical Examiners prohibits members from making material misrepresentations about their experience.

The final section in the OMB report concerns a comparison of Dr. Callery's CME work and his private cases. For instance, during October 2013 he was working on 87 different private cases. During that month he completed two OCME cases. This was compared with the 15 cases completed by AME Perlman and 15 by AME McDonough. *Id.* at 75.

While questioning certain witnesses, and during his own testimony under oath, it became apparent that Dr. Callery's primary "theory of the case" was to prove that no OCME employee working in the office during his tenure was charged and convicted of stealing or tampering with drug evidence in the custody and control of the OCME. During his cross-examination of Lt. Wallace, Dr. Callery would occasionally include factual assertions in his questions. As a lay person perhaps unfamiliar with the legal "art" of cross-examination, he was cautioned to omit personal testimony from his questions. When his tendency to do so continued, he was sworn in during the State's case so that his assertions would be made in the form of his own testimony. Again, as a lay person acting *pro se*, I did not penalize Dr. Callery for the form of his questions.

Nonetheless, during the hearing Dr. Callery presented little or no evidence which would refute the testimony and findings of Lt. Wallace, nor the reports prepared by the DSP, the DOJ, nor the OMB. That is one important reason why I have summarized the conclusions in those report in the form of factual findings here.

It is a matter of fact that Dr. Callery was criminally prosecuted as a result of the investigations into his tenure as CME. I will address the record with respect to the criminal case

below. Though the State repeatedly objected to Dr. Callery's perhaps understandable effort during the hearing to "relitigate" the criminal case, nonetheless Dr. Callery placed in evidence several documents generated during the criminal prosecution. I will summarize some of the contents of those documents to the extent that they have a bearing on the State's allegations or Dr. Callery's defense in this case.

Dr. Callery first offered a "Sentencing Memorandum" provided to the Superior Court in September 2015 by Dr. Callery's criminal defense attorney, Edward Daniel Lyons, Esq. RX 1. As Dr. Callery's counsel in the criminal case, statements made by his lawyer in his defense may fairly be attributed to Dr. Callery. In the memorandum Mr. Lyons, on Dr. Callery's behalf, admitted that Ms. Hopper and State Histologist Vahey assisted him in his private work. (Mr. Lyons notes later in the memo that Ms. Hopper informed investigators that assisting Dr.Callery in the private work consumed 50% of her time. *Id.* at 13. He then argued that her estimation was unclear, and that she was subjected to abusive questioning by investigators. *Id.* at 13-16.) In Dr. Callery's defense, Mr. Lyons adds that there is no evidence that the private work interfered with State work. RX 1 at 1. Mr. Lyons admits that Dr. Callery on occasion used State paper products. Ms. Vahey used some slides purchased by the State in the private cases. Dr. Callery did use the State computer system and email in conjunction with the private work. *Id.* at 1-2. It was further admitted that Dr. Callery had used State autopsy rooms and a State conference room for his private business.

As he had testified during the hearing, Dr. Callery was permitted by former CME Hamelí and successive Secretaries of DHSS to use the facilities so that he would be available to respond to emergencies. Though Mr. Lyons states in the memorandum that Dr. Callery's superiors knew of his private consultation work, he adds (at multiple points in the memorandum) that Dr. Callery

was permitted to use "comp time" to cover time spend in the private practice. I find that the assertion that Dr. Callery routinely claimed "comp time" (or sick leave or annual leave) when he was performing private work on "State time" is not supported by this record. *Id.* at 2.

In mitigation, Mr. Lyons states that Dr. Callery's personnel file contains no "negative performance reviews", nor any "negative comment or review". In the absence of evidence to the contrary, I accept that assertion as a matter of fact. *Id.* at 3. The memorandum also notes the lack of any performance reviews in Dr. Callery's file. *Id.* at 18.

Importantly, in the memorandum Mr. Lyons reminds the Court that the "drug lab investigation" is not part of the criminal case. *Id.* at 6. Though considerable time was devoted to the issue of drug theft or drug tampering in the OCME during Dr. Callery's watch (and the apparent lack of definitive proof of thefts or tampering by OCME employees) Mr. Lyons' representation to the Court on that point appears to be consistent with the fact that Ms. Plerhoples denied that theft or tampering by OCME employees was a part of this licensure case, nor a prerequisite for the imposition of professional discipline.

In the memorandum Mr. Lyons asserts that his client had estimated that he performed between 5-8 private autopsies in OCME autopsy rooms per year. *Id.* at 10. For the reasons set forth above, and based on independent financial documentation secured during the investigation, I find that this estimation was incorrect and substantially understated.

Again, in mitigation Mr. Lyons recounts that while Dr. Callery was CME, the OCME became accredited by ISO, the "most respected accrediting agency in the world" for such accreditations. Dr. Callery was also responsible for the establishment of DNA and fire debris labs. *Id.* at 10-11.

After a section in the memorandum which discusses the involvement of certain State employees and private individuals in Dr. Callery's private cases, Mr. Lyons contends that Dr. Callery's "private consulting business was no secret, within his office, State Government or among his colleagues nationwide." *Id.* at 26. His lack of concealment, it was argued, should serve as mitigation in regard to Dr. Callery's sentence. In these findings of fact, I have determined that Dr. Callery did in fact seek to conceal or failed to disclose certain aspects of his private practice while CME.

Later in September 2015 Dr. Callery's criminal attorney filed a two-page "Supplemental Sentencing Memorandum". RX 2. Mr. Lyons again argues that Dr. Callery's "out of office time" on private business was "appropriately covered by Compensatory Time...earned by Dr. Callery while working on State business on weekends." *Id.* The record in this case does not support that assertion. There is little or no documentary evidence that Dr. Callery sought to "true up" his out-of-office time or in-office time devoted to private cases against earned "compensatory time". Other than general and presumably self-serving assertions that he had earned "comp time" sufficient to offset the private work time, the record in this case contains no such accounting.

The third document offered by Dr. Callery which concerns the criminal case is a "Presentence Report" containing 81 pages. The Superior Court presentence investigator found, either independently or after reading investigative reports, that what Dr. Callery had been given permission to do privately while CME was subject to dispute. *Id.* at 4. Mr. Lyons' lengthy memorandum is attached to the Presentence Report, as are letters from family members and others and a copy of his CV.

Dr. Callery also offered into evidence a collection of letters in support of Dr. Callery which were addressed in 2015 to Judge Silverman, the assigned sentencing Judge in the criminal matter. RX 6. The letters were offered by him to the Court in mitigation in the criminal case. Presumably they are being offered her in mitigation of the licensure matter.

The letters were written by professional colleagues both within and outside Delaware, by attorneys, by former OCME colleagues, by Dr. Callery's family members, and others. I have read them all. It is evident from the letters that Dr. Callery enjoys an excellent reputation for professional competence, integrity, honesty and respect. Several of the letters were written by peers who have attended the national Colby College seminars. Many describe Dr. Callery's willingness to provide his expertise and guidance to others in the forensic pathology field. *Id.*

Dr. Callery also submitted a 95-page long document which constitutes a critique or response to certain allegations which have been made in conjunction with this case. RX 9. A number of pages in the exhibit comment on the effect of underfunding and understaffing on the functioning of the OCME. The exhibit also comments on problems presented by aging equipment within the OCME. *Id.* at 2-6.

The exhibit also describes or comments on the hiring process for specific OCME employees (Bailey, Woodson). *Id.* at 7-29. Materials complementing or supporting Mr. Woodson are included. The next section of the exhibit describes the Forensic Evidence Specialist position within OCME. *Id.* at 30-32.

The alarm system at OCME is discussed. *Id.* at 34. The exhibit discusses evidence vault security and the allegation that, at times, the vault room was propped open, with photos. *Id.* at 35-43. The exhibit discusses the practice of propping open the morgue door. *Id.* at 44-45. The

following facilities within the OCME are also discussed: (a) air handler room, (b) media electronics control room. *Id.* at 46-50.

The OCME key fob system is discussed. *Id.* at 51-52. The exhibit discusses "no proof of theft at OCME". *Id.* at 53-54. The discussion states that while police (such as DSP) held exhibit for "years", OCME had the exhibits for only "weeks or months." Dr. Callery observes that, in some cases, the DSP were investigating their own handling of drug evidence.

The exhibit discusses the fact that DHSS would not "permit" pre-hiring and random drug screening of employees. *Id.* at 58-61. A lengthy memo from Mr. Brown to a number of DHSS officials in August 2009 discusses, *inter alia,* staff shortages due to departures, "bare bones" staffing of OCME, a lack of lab techs and impact on productivity, and lack of other staff. *Id.* at 63-65. The document includes commentary on insufficient assistance from OMB on new hires and "dual incumbency". *Id.* at 66-70. The exhibit discusses "misinformation about employee assignments". *Id.* at 71-87. It also discusses "misinformation regarding lack of policies". *Id.* at 88-90. "Misinformation" on "employee time assignments" is discussed at *Id.* at 91-92. Finally, the subject of "large rotting plants of marijuana" in a drying box in a stairwell and security for the evidence is discussed at *id.* at 93-95.

A final, pertinent exhibit by Dr. Callery is a two-page document captioned "Is There Really a Drug Theft From OCME?" RX 12. The document lists a number of cases in which police departments had miscounted evidences submitted to the OCME. The document states that "there is no proof that drugs were stolen from OCME." Police errors should not be presumed to be the result of theft. Claims of breaks in chain of custody are "false accusations". The author of the document asks what proof there is regarding the claim of "mismanagement at the state's drug-testing lab inside the Medical Examiner's Office." *Id.*

Count II of the State's complaint in this case alleges that Dr. Callery has been convicted of a crime "substantially related to the practice of medicine". SX 1 at 4. The complaint alleges that on June 11, 2015 Dr. Callery entered a "no contest" or *nolo contendere* plea to two counts of Official Misconduct (misdemeanor) in violation of 11 *Del. C.* Sec. 1211(3).

In support of this allegation, the State offered the certified Superior Court records which are found at SX 1 at 82-90. Some documents in the record provide a summary of the facts upon which Dr. Callery's pleas were entered. The State filed its criminal information in the case on June 10, 2015. On the same date a State prosecutor addressed a letter to the assigned Superior Court Judge Silverman. In relevant part, the letter stated as follows:

> "Dr. Richard Callery, former Chief Medical Examiner, will enter a plea of *nolo contendere* to two counts of official misconduct. Pursuant to the agreement that will be presented to the Court on 6/11, Callery agrees that sufficient evidence exists to establish that, as a public servant and while intending to obtain a personal benefit, he performed official functions in a way intended to benefit his own property or financial interests under circumstances in which his actions would not have been reasonably justified in consideration of the factors which ought to have been taken into account in performing official functions."

SX 1 at 88.

The "plea agreement struck between Dr. Callery and the State was signed by Dr. Callery, Mr. Lyons and Joseph Grubb, Chief Prosecutor on April 27, 2015. It is found at SX 1 at 82. On that date Dr. Callery entered a plea of *nolo contendere* on the two counts of Official Misconduct. As conditions of the plea agreement, Dr. Callery agreed to pay restitution to the State in the amount of $100,000. That payment would be made prior to sentencing. Dr. Callery further agreed to "surrender" his Delaware medical license and not to seek its reinstatement for

the duration of any period of probation imposed by the Court, or two years, whichever is longer. *Id.*

Some additional information included in Mr. Lyons' "Sentencing Memorandum" may shed light on the two separate counts of Official Misconduct, according to Mr. Lyons. Count I alleged that Dr. Callery violated the criminal statute "by directing employees of the Office of the Chief Medical Examiner to perform duties related to his private business". Count II alleged that Dr. Callery had also violated the statute "by diverting equipment, materials and other resources provided by the State of Delaware to the Office of Chief Medical Examiner to support his private business." RX 1 at 19.

The Court accepted the "no contest" pleas on October 2, 2015 in a proceeding wherein Dr. Callery was represented by legal counsel. Dr. Callery was adjudged guilty on both counts. He was placed in the custody of the Department of Correction at supervision level 5 for one year, suspended for five months at supervision level 2, and then six months at supervision level 1. The probation terms were to run concurrently. The Court ordered a restitution payment to the State of $100,000 and the payment of the costs of prosecution and statutory surcharges. SX 1 at 83-84. At some point Judge Silverman amended the Court's sentencing order in a "note" found at SX 1 at 85. In that note the Court ordered that the restitution payment be made by Dr. Callery before or at the time of sentencing. The "note" further states that if Dr. Callery agrees to provide 500 hours of community service in a "capacity where he can use his medical skills", then the Court "will not oppose his keeping his professional license in Delaware for that purpose." "Community service" may include "teaching at medical school". In addition, if Dr. Callery agrees to provide such community service and then in fact performs that service, his sentence

would be reduced to one year at supervision level 1 probation. *Id.* Dr. Callery testified without contradiction that he satisfied these terms of his sentence.

During this hearing Dr. Callery sought to explain or minimize the fact of his "no contest" pleas. The State objected to his attempt to "relitigate" the criminal case. In the end, Dr. Callery admitted to having been convicted of the two counts of Official Misconduct in violation of 11 *Del. C.* Sec. 1211(3). In his testimony he explained that he entered the pleas because of personal and family reasons, and because of the likely costs of mounting a defense.

Based on this hearing record, I find as a matter of fact and by a preponderance of the evidence that Dr. Callery was in fact convicted of two counts of Official Misconduct (misdemeanor) in violation of 11 *Del. C.* Sec. 1211(3). I further find as a matter of fact that the Board has determined that the crime of Official Misconduct is a crime "substantially related to the practice of medicine." Bd. Reg. 15.5.4.

Conclusions of Law

The notice of this hearing provided Dr. Callery with the date, time, place and subject matter of the proceedings. The notice also provided him with a statement of his hearing rights. The notice otherwise comported with legal requirements for notices of hearings before the Board. Dr. Callery received the notice and attended the entirety of the hearing.

The legal allegations of the State in this case are set forth in the complaint at SX 1 at 4-5. For reasons to be explained, I will first address the second legal allegation. In that claim the State contends that Dr. Callery, by his acts and omissions in this case, has violated 24 *Del. C.* §1731(b)(10). That section of the Medical Practice Act states that it is "unprofessional conduct" and a basis for professional discipline if a licensee fails "to provide adequate supervision to an

individual working under the supervision of a person who is certified and registered to practice medicine."

I address this claim first because the legislature has clearly determined that inadequate supervision of others may form the basis for discipline. In my opinion Sec. 1731(b)(10) is less than a model of clarity in the drafting of legislation. One may fairly ask whether the General Assembly has deemed it "unprofessional" conduct for a licensee to fail to adequately supervise that subset of those subordinate to him who are "certified and registered to practice medicine". Or was the legislature stating that as long as the putative supervisor is "certified and registered to practice medicine", then the inadequate supervision of all those subordinate to him exposes him to professional discipline? In my view this second analysis is the logical and correct one.

But regardless of whether one takes the more restrictive or less restrictive view of the subset of "supervisees" under this section, the section applies in this case as long as failure of adequate supervision has been proven. It is beyond dispute that, at relevant times, at least some of the individuals who served under Dr. Callery were "certified and registered" to practice medicine in Delaware. The Assistant Medical Examiners were also physicians licensed by the Board.

In a number of prior cases the Board has applied the "captain of the ship" metaphor in considering the conduct of certain licensees serving in a medical supervisory role. That analogy generally holds that a maritime leader is ultimately responsible for the successes or failures of crew members serving under him when he is acting in his role as "captain". President Truman displayed another iteration of the same concept. A sign on his desk stated, "The buck stops here".

According to an exhibit offered by Dr. Callery, while he served as CME he was the "captain" of an organization of perhaps 55-60 individuals. RX 9 at 1. The CME sat at the top of that hierarchical structure. The Board-licensed Assistant Medical Examiners (whose number varied from time to time) were subordinate to Dr. Callery in the hierarchy and answered directly to him. Some of the AME's worked at the OCME campus in Wilmington. Others were assigned to work in a Georgetown office which was apparently primarily responsible for cases arising in Kent and Sussex Counties. The remainder of the OCME staff served under those individuals directly subordinate to Dr. Callery and who answered directly to him.

Before and during this hearing, Dr. Callery vouched for the credentials and supervision of his Deputy and heads of labs. As I understand one of his arguments, he put competent supervisors in their places, and thereby should not be held responsible for any supervisory deficiencies exhibited by those individuals. Such an argument would, in my opinion, constitute a misreading of prior cases where the Board has considered supervisory misconduct.

I have previously found that there was no flat prohibition against Dr. Callery performing "private" professional work while serving as CME. There was no proof offered by the State of such a prohibition. Nor did the State contradict Dr. Callery's assertion that many Chief Medical Examiners throughout the country perform such work in a specialty in which few physicians (comparatively speaking) have been trained and certified.

Nonetheless, I have also found that one important proviso governed Dr. Callery's private work. At least one in a line of Secretaries of DHSS had ordered or directed that Dr.Callery should not perform the private consulting work on "State time", or in a fashion which would conflict with time he was required to devote to his State duties as CME. Those duties necessarily included supervision of the OCME.

The record in this case documents a number of extended absences from the OCME when Dr. Callery was supposed to be engaged in his "State" work. They included trips to moderate a conference in Maine, to testify at a trial in New York, and to perform work in a forensic pathology office in West Chester PA. During trips distant from Delaware on private consulting business, speaking engagements or other commitments, Dr. Callery was not available to respond to OCME emergencies.

The record also shows that on a substantial number of occasions Dr. Callery was physically on the OCME campus but was not available to perform supervisory tasks. OCME conference rooms were used by him and others for private consultations and depositions in private cases. On other occasions Dr. Callery performed "private autopsies" in OCME rooms designed for that purpose. On some days Dr. Callery received and perhaps responded to dozens of telephone calls and emails regarding his private practice. In fact, investigators determined that Dr. Callery had developed a practice whereby he preferred that his "private" engagements be scheduled on days when he was to be engaged in State work rather than days on which he was scheduled to be "off duty".

Dr. Callery claimed that during his absences from OCME, and during those times when he was "unavailable" because working in the OCME office on private consultative work, he had accumulated sufficient "comp time" to allow him to do so. I find that Lt. Wallace sufficiently refuted that claim in his testimony. During his exhaustive investigation into OCME during Dr. Callery's watch, the State subpoenaed, seized or was provided with extensive OCME records. A review of those documents provided little or no evidence of Dr. Callery's documentation of his "comp time", nor documentation of any effort to match up his "private" time with a corresponding amount of "comp time" in order to justify or substantiate that no "State time" had

been "stolen" by him. In the context of this case, "stealing time" was a phrase used by investigators to mean time which Dr. Callery was to have devoted to his State duties, including supervision of the office.

Another fact in this case constitutes, in my opinion, clear evidence that Dr. Callery had acknowledged his wrongful use of or accounting for the 37.5 weekly hours which he was to have devoted to State business under the terms of his employment agreement. In his plea agreement Dr. Callery had agreed to, among other things, a payment of $100,000 in restitution to the State. SX 1 at 82. Apparently that was a "negotiated" figure between him and the State. (He may have believed it was "high", while the State contended it was "low".) Regardless, I have concluded that the vast majority of that restitutional amount was not intended to reimburse the State for the use of State stationery to print his CV, nor glass slides at pennies each, nor some stain used by a State histologist to prepare "private" slides. Rather, the majority of the amount was an acknowledgement by Dr. Callery that he was "missing from duty" during substantial periods of time while CME.

And while he was "missing from duty", he was not supervising the OCME. The record in this case (much of it in documents provided by Dr. Callery) demonstrates that OCME was faced with a number of problems which Dr. Callery was ultimately responsible to solve. They included lack of adequate staffing, lack of adequate funding by the State, lack of adequate and effective drug testing of job applicants and hired staff, aging of lab equipment, inadequate security equipment and precautions, necessary moving of available employees into positions for which they were not qualified, and the like. All of these problems ultimately required Dr. Callery's leadership both within and outside the office.

I therefore find as a matter of law that Dr. Callery failed to provide adequate supervision to individuals performing the important work of the OCME in violation of 24 *Del. C.* §1731(b)(10). That failure was primarily caused not by Dr. Callery's aversion to work. He is an ambitious and competent forensic pathologist. Rather, the failure was caused by his choice to engage in "private" consultative work for remuneration at the expense of his assigned State duties, which necessarily included oversight and supervision of OCME.

The State also contends that Dr. Callery has violated 24 *Del. C.* §1731(b)(3). That section of the Act deems it "unprofessional conduct" to engage in "(a)ny dishonorable, unethical, or other conduct likely to deceive, defraud, or harm the public." *Id.*

The Board has undertaken to define, by regulation, the phrase "dishonorable or unethical" conduct as it appears in Sec. 1731(b)(3). Though the relevant regulation has undergone several iterations during the years relevant to this case, those iterations have been consistent in at least one respect. The regulation as adopted by the Board in October 2011 stated that "dishonorable or unethical" conduct includes (but is not limited to) "any...act tending to bring discredit upon the profession." Bd. Reg. 15.1.10 (2011). The Board readopted that definition when it updated its regulations in June 2012. The Board continued to readopt the regulation when rules were revised again in June 2015. Bd. Reg. 8.1.16.

When a Delaware statute does not internally define a word or phrase employed by the legislature, the interpreter of the Delaware Code is instructed to read words in context and to construe them according to the common and approved usage of the English language. 1 *Del. C.* Sec. 303. The word "ethical" has been defined, *inter alia*, as "...conforming to acceptable professional standards of conduct...." *Webster's Collegiate Dictionary* (10th ed. 1996) at 398. Hence, an act is "unethical" if it does not conform to acceptable professional standards.

I have concluded as a matter of law that Dr. Callery's actions in this case fall short under both the language chosen by the legislature and that employed by the Board. Under 24 *Del. C.* §1731(b)(3), Dr. Callery's conduct failed to conform to "acceptable professional standards". The Medical Practice Act deems it "unprofessional conduct" to fail to provide adequate supervision" as a medical practitioner. 24 *Del. C.* §1731(b)(10). Hence, as a matter of public policy in this State, to fail in one's professional medical duty to adequately supervise others is to fail to conform with a professional standard set by the legislature. I incorporate my findings with regard to Dr. Callery's inadequate supervision of OCME as if fully restated here.

I further find as a matter of law that Dr. Callery has violated the relevant Board regulation which provides a non-exhaustive list of those acts or omissions by a medical licensee which constitute "dishonorable or unethical" conduct. The record in this case supports the conclusion, by a preponderance of the evidence, that his actions as CME have tended to bring discredit upon the profession".

Perhaps in a hyperbolic statement, Lt Wallace characterized this case as one of the most significant and notorious drug laboratory cases in U.S. history. Putting that statement aside, it is not in dispute that this case garnered substantial publicity in Delaware. Regardless of the absence of proof that an OCME employee working with evidence in the office during Dr. Callery's tenure as CME stole an identified piece of drug evidence on a given date, during Dr. Callery's term OCME suffered a substantial upheaval.

As a result of certain findings by investigators led by Lt. Wallace, most or all of the more than 9,000 pieces of drug evidence housed in the OCME were essentially seized by police and moved to the custody of a police troop. Again, according to the record in this case, hundreds of pending drug cases were dismissed and prosecutions interrupted. Those convicted of drug

offenses and whose physical evidence had once been in the custody of the OCME moved for retrials, acquittals or for other relief. Dr. Callery was disqualified from testifying in future cases because his testimony would be subject to compromise or impeachment based on the facts of this case. Since it was a matter of public record that Dr. Callery holds medical licensure in Delaware, his leadership of the OCME at relevant times brought discredit upon the profession.

Furthermore, Dr. Callery was found to have used State resources in conducting private work while CME He was found to have been absent from his OCME work during substantial periods of time when he was to have provided supervision over the office. These activities by Dr. Callery while CME harmed the public because of the impact on the State criminal justice system and because he had "stolen" State time and otherwise used resources paid for by State taxpayers. He accepted the fact that he had caused substantial harm when he entered his guilty pleas and agreed to a substantial restitution payment to the State Treasury. I have therefore concluded as a matter of law that the State has proven multiple violations of 24 *Del. C.* §1731(b)(3) on the record of this case.

The State's final claim under "Count I" of its complaint is that Dr. Callery has violated 24 *Del. C.* §1731(b)(11). That section of the Medical Practice Act deems it "unprofessional conduct", in relevant part, if a licensee engages in "(m)isconduct...incompetence, or gross negligence or pattern of negligence in the practice of medicine...." *Id.*

It is not in dispute that the Chief Medical Examiner of the State must be a licensed Delaware physician. Dr. Callery conceded during his testimony that most, if not all, of his "patients" while serving as CME were deceased. Nonetheless, that does not mean that he was not engaged in the "practice of medicine." In Delaware postmortem examinations may only be performed by duly licensed physicians. 16 *Del. C.* Sec. 2707(a). Under current law the Chief

Medical Examiner must be a board-certified pathologist. 29 *Del. C.* Sec. 4703(a). Assistant Medical Examiners must also be physicians. *Id.* at Sec. 4703(b).

While the performance of autopsies perhaps does not fit neatly under the definition of the "practice of medicine" in the Medical Practice Act, nonetheless the Board may (or may not) agree that the performance of an autopsy is the undertaking of a "surgical operation on another person". 24 *Del. C.* §1702(12)(d). Regardless, in my view the legislative intent is clear that the typical professional work of a medical examiner in this State constitutes the "practice of medicine", whether that physician is at the autopsy table or performing other duties assigned to his office.

In her closing argument, the State's attorney contended that examples of "misconduct" are found in Lt. Wallace's report. Among those examples are violations of the State Employees', Officers' and Officials' Code of Conduct, 29 *Del. C.* Ch. 58. In the opinion of Lt. Wallace, those violations include the following: (a) having an interest in a private enterprise which is in substantial conduct with the proper performance of his official duties in violation of 29 *Del. C.* Sec. 5806(b), (b) the use of public office to secure private gain in violation of 29 *Del. C.* Sec. 5806(e), and (c) the disclosure of confidential information gained by reason of his public position for personal gain or benefit in violation of 29 *Del. C.* Sec. 5806(g). SX 1 at 106-107. I recognize that these opinions or conclusions have been made by an investigator and not an independent arbiter. That said, in my view the evidence in this case would support a finding of multiple violations of the State Code of Conduct.

In addition, Lt. Wallace further concluded that in this case Dr. Callery violated the Delaware Transportation of State Employees Act, 29 *Del. C.*Ch. 71 in two respects. Lt. Wallace found that Dr. Callery had (a) operated a State motor vehicle assigned to him before or after the

prescribed working hours of the employee in violation of 29 *Del. C.* Sec. 7106(a), and (b) failed to park a State vehicle at the agency to which the vehicle was assigned in violation of 29 *Del. C.* Sec. 7106(b).

After a careful assessment of the factual record in this case, I have concluded that the State has proven multiple violations of these ethical and transportation-related statutes.

Whether or not the Board finds that these ethical and transportation violations constitute the sort of general "misconduct" covered by 24 *Del. C.* §1731(b)(11), the other language in that statute may be pertinent here. Sec. 1731(b)(11) in the Act also deems "incompetence, or gross negligence or pattern of negligence in the practice of medicine" to form a basis for professional discipline.

In this case the State neither alleged nor proved that Dr. Callery is an "incompetent" forensic pathologist. Nor, to my recollection, did the State argue that Dr. Callery was "grossly negligent" while serving as CME. In the context of the State Tort Claims Act, 10 *Del. C.* Ch. 40, the Delaware Supreme Court has defined "gross negligence" as a "higher level of negligence representing an 'extreme departure from the ordinary standard of care'." *Browne v. Robb*, 583 A.2d 949, 953 (Del. 1990). As I view this record, other than performing his "private" professional duties at the expense of his State duties, I do not find the sort of "extreme departure" from standard of care which would support such a finding.

Hence we are left with the phrase "pattern of negligence in the practice of medicine" in 24 *Del. C.* §1731(b)(11). Again, the phrase "pattern of negligence" is defined in neither the Medical Practice Act nor Board regulations. "Negligence" has been defined as a "failure to exercise the care that a prudent person usually exercises." *Webster's* at 777. "Pattern" is

defined, in relevant part, as "a reliable sample of traits, acts, tendencies or other observable characteristics of a person...." *Webster's* at 853.

Of course "negligence" has also taken on a not dissimilar meaning in Delaware courts. Delaware juries are routinely instructed that civil "negligence" is "the lack of ordinary care; that is, the absence of the kind of care a reasonably prudent and careful person would exercise in similar circumstances." *Del. P.J.I. Civ.* Sec. 5.1. When the two definitions are blended, the concept of "negligence" means that a person has failed to exercise the kind or degree of care which a reasonably prudent person would exercise in similar circumstances.

Put in the context of this case, the question is whether Dr. Callery acted with the absence of the kind of care that a reasonably prudent medical examiner would exercise under similar circumstances." In other words, a person such as Dr. Callery had a civil "duty" to exercise such care. If he failed to do so, he has acted negligently. If his actions over time demonstrated a a "pattern" of such behavior, then he has engaged in a "pattern of negligence".

An important part of Dr. Callery's admittedly unique practice of medicine was his administration, supervision and leadership of the OCME. When he stepped away from the autopsy table, he did not cease to "practice medicine". I have formed the legal conclusion that the State has proven a "pattern of negligence" by him in this case. The reasonable and prudent medical examiner abides by the laws and regulations which pertain to his or her public office. He also abides by clear understandings governing professional work which has the potential of interfering with his public duties. In this case Dr. Callery knew or should have known that it was essential that he prioritize his public duties over his private ones. In failing to do that on multiple occasions over an extended period, Dr. Callery engaged in a "pattern of negligence" in violation of 24 *Del. C.* §1731(b)(11).

"Count II" of the State's complaint alleges that Dr. Callery has been convicted of crimes which are substantially related to the practice of medicine in violation of 24 *Del. C.* §1731(b)(2). That section of the Act deems it "unprofessional conduct" to engage in "(c)onduct that would constitute a crime substantially related to the practice of medicine". *Id.*

Acting pursuant to 24 *Del. C.* §1713(e), the Board has adopted a list of those crimes which are "substantially related to the practice of medicine". Dr. Callery entered his plea of *nolo contendere* or "no contest" in April 2015. He was sentenced on that plea in October 2015. In the plea Dr. Callery pled "no contest" to two separate misdemeanor counts of Official Misconduct in violation of 11 *Del. C.* Sec. 1211. The Board's list of "crimes substantially related" included Official Misconduct at the time when Dr. Callery signed his plea agreement. Bd. Reg. 28.5.6. Though the Board issued a new iteration of its regulations between the time of Dr. Callery's plea and the time of his sentencing, in October 2015 the crime of Official Misconduct again appeared on the Board's list in October 2015. Bd. Reg. 15.5.4.

The Class A misdemeanor offense of Official Misconduct states, in relevant part, as follows:

> "A public servant is guilty of official misconduct when, intending to obtain a personal benefit or to cause harm to another person:
>
> . . . . .
>
> (3) The public servant performs official functions in a way intended to benefit the public servant's own property or financial interests under circumstances in which the public servant's actions would not have been reasonably justified in consideration of the factors which ought to have been taken into account in performing official functions."

Dr. Callery was represented at all times in the criminal proceedings by competent defense counsel. He had the right to refuse to negotiate with the State or to refuse the terms of the

offered plea agreement, and to demand a jury trial. He did not do so. His self-interested explanations or reasons today for his "no contest" pleas in 2015 are not availing. They do not negate the fact of the convictions. The documentation of his pleas and sentencing has been properly certified by the Clerk of the Superior Court to the Board. Based on this record, I therefore conclude as a matter of law that the State has proven two violations of 24 *Del. C.* §1731(b)(2) in the form of *nolo contendere* pleas and subsequent convictions on two counts of Official Misconduct in violation of 11 *Del. C.* Sec. 1211.

The Board has adopted a matrix or "guidelines" to render professional discipline more uniform and to inform licensees of the consequences of certain conduct. The matrix is found at Bd. Reg. 17.0 *et seq.* According to those guidelines, a violation of 24 *Del. C.* §1731(b)(3) may be assessed a range of discipline from a fine of $1,000 up to six months' suspension of license. A violation of 24 *Del. C.* §1731(b)(10) carries a range of $1,000 up to such a fine plus a letter of reprimand. A violation of 24 *Del. C.* §1731(b)(11) (pattern of negligence) carries a range of one year's license probation up to suspension with reinstatement upon a showing of satisfactory improvement. Finally, a violation of 24 *Del. C.* §1731(b)(2) carries a range from 90 days' probation up to suspension with reinstatement after a showing to the Board of practice improvement. For this last violation, the length of suspension shall "not be less than any court-ordered sanctions". *Id.*

The Board may diverge from these ranges of professional discipline upon proof of mitigating and aggravating circumstances. The "mitigators" are listed at Bd. Reg. 17.15 *et seq.* In my opinion the following mitigating circumstances in that regulation are present here: absence of prior disciplinary record; length of time that has elapsed since misconduct; no

apparent vulnerability of patient; present fitness of the practitioner; potential for successful rehabilitation; practitioner's present competence in medical skills. *Id.*

The "aggravating" or "worsening" factors are listed in Bd. Reg. 17.14 *et seq.* In my opinion the following aggravators are present in this case: frequency of acts; dishonest or selfish motive; motivated by personal gain; different multiple offenses; refusal to acknowledge wrongful nature of certain conduct; intentional acts; abuse of trust; pattern of misconduct; illegal conduct; ill repute upon profession. *Id.*

In this case the State requests that the Board order the suspension of Dr. Callery's medical license for two years. The State's attorney argued that Dr. Callery agreed to a suspension of such length in his plea agreement. In his closing argument Dr. Callery conceded that that was correct. He also stated that he "expects the Board to revoke me". Nonetheless, under the facts of this case Dr. Callery argued that license revocation is not a suggested penalty for his violations of the four provisions of the Medical Practice Act. He argued that proper and adequate discipline in this case should be a six month probationary period for his license.

I do not believe that the range of discipline for the four statutory violations in this case, coupled with the mitigating and aggravating factors, warrant license revocation in this instance. Dr. Callery's competence, the respect for him verbalized by his peers, and his lack of any prior disciplinary record with the Board indicate that revocation would be too severe a level of discipline. Apparently the State agrees with that proposition.

Nonetheless, the Board has determined in its disciplinary matrix that some level of license suspension is appropriate for three of the four violations of the Medical Practice Act which I have found to have been proven. I have concluded that approximately six "mitigating"

factors are present in this case under Board rules, as well as ten "aggravating" factors. Hence, the latter outweigh the former, albeit not to a substantial degree.

The level of discipline recommended below is therefore driven partially by the fact that three of the four statutory violations deem license suspension to be within the range of permissible disciplines. One of the provisions holds that license suspension should not exceed six months in duration. The other two do not place a cap on the length of suspension. The presence of more aggravators than mitigators in this case suggests that the Board should impose a suspension above the maximum six month term set in Bd. Reg. 17.5.1 for a violation of 24 *Del. C.* §1731(b)(3).

In addition, I note that the violations of the Act which were proven in this case occurred over an extended period of time. Further, each violation of the Medical Practice Act was not a single event or transaction, but represents multiple acts of professional misconduct and a course of conduct over time. In his plea agreement Dr. Callery acknowledged the substantial harm caused to the State by virtue of his "dual" private and public practice while CME. While he agreed to a sum certain regarding the Court-ordered restitution, no price tag was placed on the damage caused to the State criminal justice system which was proven in this case.

Due process has been afforded in these proceedings.

Recommendation

Based on due consideration of all relevant evidence in this case and on the findings of fact and conclusions of law set forth above, the following is recommended to the Board:

1. That the Delaware medical license presently issued to Richard T. Callery, M.D. be suspended for a period of 18 months, effective on the date when a majority of the Board of Medical Licensure and Discipline shall vote in the affirmative to impose such professional discipline;

2. That Dr. Callery be permitted to petition the Board, in writing, at the close of his period of license suspension in order to make a showing that his period of suspension should be lifted and that he is fit to return to medical practice;
3. That if the Board is satisfied that the period of his license suspension should be terminated, the Board reserve the right to impose any conditions or restrictions on Dr. Callery's return to practice which are deemed reasonable and necessary for the protection of the health, safety and welfare of the public;
4. That the final order of the Board in this case constitute public disciplinary action reportable to pertinent public practitioner data bases.

Roger A. Akin
Chief Hearing Officer

Date: May 30, 2019

Any party to this proceeding shall have twenty (20) days from the date on which this recommendation was signed by the hearing officer in which to submit in writing to the Board of Medical Licensure and Discipline any exceptions, comments, or arguments concerning the conclusions of law and recommended penalty stated herein. 29 *Del.C.* §8735(v)(1)d.